

# Symposium

## Forbidden Conversations: On Race, Privacy, and Community (A Continuing Conversation with John Ely on Racism and Democracy)

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## INTRODUCTION

"Hey Chuck! You're on the school board. I need to ask you about which schools are the good ones here in D.C. We're in the market for a house. Can you recommend a good public school?" The question comes from a young colleague, a liberal Democrat who supports integration and affirmative action. His child is still less than a year old, and it strikes me as a little early to be worrying about elementary schools, but I'm not surprised. Today young urban professionals start worrying about where they will send their children to school well before their first child is conceived. Perhaps parents have always been concerned about their children's education, but my colleague knows the stakes are different now. He has read the *New York Times* story describing a rapidly growing industry of consultants with names like "Ivy Wise Kids" who will coach parents on how to prepare four- and five-year-olds for preschool tests and interviews.<sup>1</sup> He is positioning his child in a competitive market, and his choices will determine that child's future (or at least his chances to get into Harvard or Yale). What parent wouldn't use every asset at his disposal to maximize his children's options?

I answer with a list of four or five elementary schools that I assure him are as good as any private school in the city. All of them are located in white neighborhoods west of Rock Creek Park. I do not mention the school that my children attend. I know that theirs is not the school he envisions when he asks me about "good schools." For one thing, it's too black,<sup>2</sup> but it's much more complicated than that. There are huge silences in this apparently casual, good-natured, informational conversation between colleagues. Not really silence, but things left unsaid, which I experience as my silence. I am thinking about what the good schools look like, about what the children at the good schools look like and who their parents are. I'm thinking about the not-so-good schools in the city—there are many more than four or five of these—about the terrible schools and the children

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1. Robert Worth, *For \$300 an Hour, Advice on Courting Elite Schools*, N.Y. TIMES, Oct. 25, 2000, at B12. The article quotes Mark H. Sklarow, executive director of the Independent Educational Consultants Association, as saying, "'Parents generally have a very skewed perception of the private school world . . . They're convinced that if they don't get into a good nursery school, they're never going to get into the right prep school, they won't get into Harvard, and their life is over.'" *Id.*; see also Marco R. della Cava, *Parents and Preschool: Schmooze or Lose*, USA TODAY, Aug. 28, 2002, at 1D (discussing the competitive market for private school spots); Jane Gross, *Right School for 4-Year Old? Find an Adviser*, N.Y. TIMES, May 28, 2003, at A1 (describing the market for advisers).

2. See D.C. PUB. SCH., MEMBERSHIP IN THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS BY SCHOOL, GRADE, RACE AND SEX 21 tbl. (2003), available at [http://www.k12.dc.us/dcps/frontpagepdfs/membershipOct703\\_race.pdf](http://www.k12.dc.us/dcps/frontpagepdfs/membershipOct703_race.pdf) (reporting that Shepherd Elementary School has a total of 351 students, of whom 320 are black, 13 white, 13 Hispanic, and 5 Asian).

in those schools and their parents.<sup>3</sup> I'm thinking about what caused these conditions. Part of me is resenting my colleague's question and judging his reason for asking, but I am a parent and I understand a parent's honorable motive. I do not speak of these things because there is an unspoken agreement that we will not speak of racism and its consequences when our friends, neighbors, or colleagues must make choices about the lives of their children. If I speak of the racism that has created these conditions, I will likely be heard to call my colleague racist. I would be misunderstood, and I do not want to offend. I tell myself that I just do not have the time or energy for this complicated conversation, but I feel guilt for my silence. I am participating in the taboo against the conversations that must be had.

This article considers the subject of my silence, the relationship between the constitutional injury of racial segregation and the privatization of education. When I speak of privatization here I do not only mean the flight to private schools or the corporatization of school systems or the politics of school vouchers,<sup>4</sup> although these are all symptoms of the larger problem I wish to explore. The larger problem is something I call the privatization of care and concern for and conversation about the education of our children. I believe that public policymakers and individual parents increasingly think and speak about children's right to equal educational opportunity as if that project were primarily about giving parents the "liberty" to be consumers in the education market on behalf of their own children. The decisions about how to educate our children (meaning the children in our nuclear family)—where we will school them, who their classmates will be, what curriculum they will be taught—are thought of as private, and part of our constitutionally protected liberty to raise our children as we see fit.<sup>5</sup> When my colleague asks about a good school for his son, he is not engaging me in a conversation about what school is best for his children *and* mine, much less for the poor black children who live in

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3. The D.C. Public School (DCPS) system's enrollment is 84.4% black and 4.6% white. D.C. Pub. Sch., Just the Facts, <http://www.k12.dc.us/dcps/offices/facts1.html#4> (last visited Mar. 31, 2005). Of the 108 elementary schools in the DCPS system, 24 schools have 100% black enrollment. See D.C. PUB. SCH., *supra* note 2, at 5-26 tbl. The D.C. government website lists 27 elementary schools where 75% of students test at or above a basic level in reading and math. Significantly, of those 27 relatively high-performing schools, only 3 of the schools with 100% black enrollment made the list, while all 11 of the elementary schools enrolling more than fifteen white students are ranked. *Id.*; Wash. D.C. Educ. Ctr., Quick Report: Public Schools with 75% Testing Basic & Above in Reading & Math, [http://dcschoolsearch.dc.gov/schools/report\\_results.asp?report\\_id=11](http://dcschoolsearch.dc.gov/schools/report_results.asp?report_id=11) (last visited Mar. 31, 2005).

4. See generally SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 221 (2004) ("[B]etween 1993 to 1999, the number of families choosing options other than a neighborhood public school, whether public, private, or home-schooling, increased by a third, with most of that increase coming from parents placing their children in public schools of choice—magnet or charter schools."); PETER W. COOKSON, JR., SCHOOL CHOICE: THE STRUGGLE FOR THE SOUL OF AMERICAN EDUCATION 17-37 (1994).

5. See *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

D.C. When parents search for a good school for their children, they do not see the project as collective, as about how we will engage the political process as a community to determine what is best for all our children and see to it that they get it.

How is this privatized view of education related to the segregation of urban schools? An obvious answer is that private schools have often been a haven for whites resisting school desegregation.<sup>6</sup> But I want to explore a more complex story about this relationship. It is not the relatively straightforward story of Prince Edward County, a Virginia school district that closed all of its public schools from 1959 to 1964 and provided tuition grants to private white academies,<sup>7</sup> but the story's impact on poor black children is not entirely different. In the nation's capital, only 4.6% of the children attending public schools are white.<sup>8</sup> By the time they reach their senior year in high school, less than 1% of the graduating class is white.<sup>9</sup> More than 60% of D.C.'s public school students are eligible for free or reduced-price lunch.<sup>10</sup> The race and class segregation within the District is even more extreme. The schools east of the Anacostia River in Wards Seven and Eight are more than 99% black.<sup>11</sup> More than 90% of the school district's white elementary students go to a few schools in the white neighborhoods west of Rock Creek Park and on Capitol Hill.<sup>12</sup>

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6. See *Griffin v. County Sch. Bd.*, 377 U.S. 218, 232-34 (1964) (affirming the district court's power to order the school board to cease tuition grants to white students enrolling in private academies and to order reopening of public schools that had been closed in response to a desegregation order); *Lee v. Macon County Bd. of Educ.*, 231 F. Supp. 743, 754-55 (M.D. Ala. 1964) (three-judge court) (ordering state officials to refrain from interfering with the enforcement of court-ordered desegregation); *Hall v. St. Helena Parish Sch. Bd.*, 197 F. Supp. 649 (E.D. La. 1961) (three-judge court) (finding unconstitutional a Louisiana statute allowing public schools under desegregation orders to convert to private schools and operate as segregated institutions using state tuition grants), *aff'd*, 368 U.S. 515 (1962).

7. See *Griffin*, 377 U.S. at 223-24.

8. See *supra* note 3.

9. There were only 122 white twelfth-grade students in the entire D.C. system in 2003, out of a total of 2484 twelfth graders. See D.C. PUB. SCH., *supra* note 2.

10. NAT'L CTR. FOR EDUC. STATISTICS, CHARACTERISTICS OF THE 100 LARGEST PUBLIC ELEMENTARY AND SECONDARY SCHOOL DISTRICTS IN THE UNITED STATES: 2001-02, at 28 tbl.8 (2003), available at <http://nces.ed.gov/pubs2003/2003353.pdf>.

11. See D.C. PUB. SCH., *supra* note 2. The 2000 Census showed the District's overall resident population to be about 60% black and 30% white. Census Bureau, D.C. QuickFacts, <http://quickfacts.census.gov/qfd/states/11000.html> (last visited Mar. 31, 2005). Yet in 2000-2001, the city's schools were 85% black and just 5% white. D.C. PUB. SCH., *supra* note 2.

12. See D.C. PUB. SCH., *supra* note 2. The extreme racial segregation in the D.C. public schools is not unique. According to research by Gary Orfield and others, the nation is currently experiencing a return to segregated schools. "Although whites make up two-thirds of U.S. students in 2001, the typical white student attends a school where four out of five children (79%) are white," while typical "Black and Latino students attend schools where two-thirds of the students are Black and Latino and most students are from their own group." GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., *BROWN AT 50: KING'S DREAM OR PLESSY'S NIGHTMARE?* 16-17 (2004), available at <http://www.civilrightsproject.harvard.edu/research/resseg04/brown50.pdf>.

Just over fifty years ago Washington, D.C. schools were segregated by law.<sup>13</sup> In 1967, a federal court found that while the District had desegregated its schools, it had maintained segregated classrooms within its schools through a system of tracking students that perpetuated the inequalities of the old *de jure* system.<sup>14</sup> But today's segregation is not the product of intentional government decisions. Rather, it is what the courts have called *de facto* segregation. *De facto* segregation does not constitute a cognizable constitutional injury because it is caused not by actions traceable to the state<sup>15</sup> but by the private acts of individuals who "choose" to live in a segregated neighborhood or to send their children to a segregated school.<sup>16</sup> In the years immediately following *Brown v. Board of Education*, we spoke of *de facto* segregation with the understanding that despite the absence of legal injury there was still an injury in fact, an injury we could see and measure, an injury caused by our private acts, a moral injury for which we were personally and collectively responsible.

However, this lay understanding of *de facto* segregation has changed in recent years. We have come to think of *de facto* segregation not simply as the absence of judicially cognizable constitutional injury, but as the absence of any injury at all. If poor black children in Washington, D.C. are injured, it is not by their racial and economic isolation but by dysfunctional public schools. Fifty years after *Brown* and *Bolling v. Sharpe*, the word "segregation" is rarely spoken in public policy discussions or private conversations. Almost no one talks about racism, stigma, or white flight or about what whites are running from and what they are taking with them. There is a great deal of talk about the disastrous state of our public schools—in think tanks, on editorial pages, and at dinner parties where the invited guests all send their children to private schools. The *Washington Post* sees a bloated bureaucracy, a corrupt teachers' union, incompetent

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13. Segregation in Washington, D.C. was declared unconstitutional in 1954. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

14. *Hobson v. Hansen*, 269 F. Supp. 401, 512 (D.D.C. 1967), *aff'd sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969) (en banc).

15. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 198 (1973) ("[W]here no statutory dual system has ever existed, plaintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action.").

16. See, e.g., *Freeman v. Pitts*, 503 U.S. 467, 495 (1992) ("Where resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts."). But cf. *Keyes*, 413 U.S. at 216 (opinion of Douglas, J.) ("[T]here is no constitutional difference between *de jure* and *de facto* segregation, for each is the product of state actions or policies. . . . There is state action in the constitutional sense when public funds are dispersed by urban development agencies to build racial ghettos. . . . When a State forces, aids, or abets, or helps create a racial 'neighborhood,' it is a travesty of justice to treat that neighborhood as sacrosanct in the sense that its creation is free from the taint of state action.").

school administrators, and ineffective school board members.<sup>17</sup> President Bush's No Child Left Behind Act requires "standards" and "assessment" to be sure "low-performing" schools are held "accountable."<sup>18</sup> But no one talks about who has left whom behind. No one measures the enormous divestment in social and political capital that has accompanied white flight. No one holds accountable the parents who have fled to the manicured lawns of private schools.

This silence on the subjects of race, racism, and segregation and their relationship to the increasingly privatized view of education is the more complicated story that must be understood. It is a story of people of good will who are nonetheless responsible for the segregation of the public schools—white parents with black friends, colleagues, and neighbors who are afraid to send their children to public schools where most of the children are black, and middle-class black parents who are also afraid.<sup>19</sup> These fears are related to race and racism, and they divert us from thinking about injury to the moral obligation of inclusion in community, the obligation that is the subject of *Brown* and the foundation of our democracy.

This article continues a longstanding conversation I have had with John Ely about a subject central to both of our work. It asks questions that each of us has often asked and sought to answer. How should constitutional

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17. See Justin Blum, *Mayor's School Plan Still Two Votes Short*, WASH. POST, Apr. 20, 2004, at B1 (quoting Sheila Ford, principal of Horace Mann Elementary School, voicing her support for mayoral control of the school system ("The system is so dysfunctional that I am speechless and embarrassed to admit that I am associated with DCPS. Nothing works! There is no leadership, vision, mission or competency.")); Justin Blum, *Union Chief Led by Quashing Dissent*, WASH. POST, Oct. 7, 2003, at B1 (describing the misuse of union funds by former Washington Teachers' Union president Barbara Bullock); Doug Struck, *Special Ed System Exact's a Price in Waste, Neglect*, WASH. POST, Feb. 19, 1997, at A1 (analyzing the dysfunction of the special education system, one of many problems facing a public school bureaucracy that was given "straight F's" the prior year by the D.C. financial control board).

18. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 101, 2001 U.S.C.A.N. (115 Stat.) 1425, 1439-40 (2002); see also GAIL L. SUNDERMAN & JIMMY KIM, THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., INSPIRING VISION, DISAPPOINTING RESULTS: FOUR STUDIES ON IMPLEMENTING THE NO CHILD LEFT BEHIND ACT (2004).

19. Throughout this article I use the term "white flight" to refer to the phenomenon of a substantial number of white families taking their children out of (or choosing never to enroll them in) urban public school systems where the majority of the children are black or Latino. A significant, but much smaller, group of upper-middle-class black parents leave the public schools and enroll their children in token numbers in predominantly white, private and suburban public schools. In the District of Columbia white flight is also a class phenomenon. White and black families who flee urban public schools must possess the financial resources required to send their children to private schools or move to suburban jurisdictions where the majority of children are white and upper middle class. The causes of white flight and middle-class black flight are not identical, but both are symptoms of the ideology and structural conditions produced by racism. While a detailed analysis of the complicated relationship between race and class in explaining white and middle-class black flight is beyond the scope of this article, I discuss the fears that motivate fleeing white and black parents in Part II.

theory account for the impact of racial prejudice on American democracy? In particular, how does racism affect the way we create community and make decisions about who we are and about the laws that govern our behavior? How should what we understand about our society's racism shape the meaning we give and the role we assign to the Equal Protection Clause of the Fourteenth Amendment?

In *Democracy and Distrust* Ely makes questions of participation in the process of representative democracy the touchstone of his constitutional theory.<sup>20</sup> The duty of democracy's decisionmakers to take into account the interests of all of those whom their decisions affect stands at the center of Ely's theory of representation reinforcement. This article explores how that duty is dishonored when racism—and a failure to talk honestly about race—excludes poor black and brown children from the circle of care that defines the scope of that duty.

Part I of the article tells the story of two law professors and their early efforts to enlist their neighbors in the integration of the local urban public school. The narrative explores the virtues of race and class integration and of collective public conversation and action in pursuit of those goals. I seek to convey how hard it is for parents to talk with one another about race and racism. We experience these conversations as especially difficult because we feel a profound intimacy with our children that reinforces our predisposition to think of decisions about school choice as located in the private sphere.

In Part II, I ask about the often unacknowledged fears that cause white and middle-class black parents to flee predominantly black urban schools. I suggest that these fears originate in cultural beliefs about blacks; in parents' accurate observations that less is given to and expected from children in segregated black schools; in parents' concerns that their children will be losers in a competitive, market-driven world; and in parents' experiences of loneliness and alienation in the responsibility of raising children.

Part III considers two landmark constitutional cases, *Brown v. Board of Education* and *Pierce v. Society of Sisters*. I argue that *Brown* is best understood within the context of the nation's commitment to the common school as an institution that creates and defines community. When white parents abandon urban public schools, the segregated suburban and private schools their children attend replace the common school as a marker of community membership and, in excluding poor black and brown children, recreate the injury identified in *Brown*. These parents excuse themselves from *Brown*'s moral obligation of inclusion by invoking the liberty

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20. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 181 (1980).



announced in *Pierce* that makes the relationship between parent and child “private.” I argue that to invoke this liberty in the service of race and class subordination distorts *Pierce*’s meaning. My discussion of *Brown* and *Pierce* introduces my conversation with John Ely. I explore the divergent paths we take from our common understanding of the distorting influence of racial prejudice on democratic process. These different paths are determined by Ely’s view of the Equal Protection Clause as a constitutional instrument for preserving democracy’s process and my own view that the Equal Protection Clause announces a new substantive value of antisubordination. I argue that Ely fails to account for the significant process defect occasioned when the private decisions of fleeing parents are distorted by prejudice and when the taboo against talk about race and racism inhibits speech.

Part IV tells the story of the District of Columbia Public School Board’s decision to introduce a lottery for the purpose of deciding which parents may send their children to non-neighborhood public schools. I examine the tension between a view of equality that defines equal opportunity in terms of formal equal access to places in the best schools and one that focuses on encouraging race and class integration as a means of improving the health of the entire system by minimizing privileged parents’ flight and maximizing the system’s retention of race- and class-based social and political capital.

Part V returns to my conversation with John Ely. *Democracy and Distrust* assumes that courts should be the primary interpreters of constitutional meaning and argues that judges should find that meaning in an authority external to the interpreter. This article argues that all of us are engaged in shaping and defining constitutional values and that when we focus only on judicial review we deny our own responsibility for the normative choices we make. The subject of our own responsibility for constitutional values becomes a forbidden conversation.

## I. A STORY ABOUT TRYING TO TALK TO NEIGHBORS ABOUT SCHOOL INTEGRATION

### A. *An Integrated Neighborhood, a Segregated School*

It is the summer of 1992. Mari Matsuda and I have come to Washington, D.C. to teach at Georgetown. We move into a lovely 1920s brick colonial house in a neighborhood called Shepherd Park. We love the quiet, tree-lined streets, the old houses and big yards. But what really sold us on the house was that this is perhaps the only truly integrated

neighborhood in the city. Shepherd Park is almost evenly divided between black and white families who live side by side throughout the neighborhood. In recent years a sprinkling of Latino and Asian families have come to the neighborhood, as have a few openly gay couples. Of course, this has not always been so.

In 1920, when Boss Shepherd's huge country estate was divided into lots and the houses that still stand on our block were built, the deeds contained restrictive covenants forbidding sale to blacks or Jews.<sup>21</sup> In the 1940s, when those covenants were rendered judicially unenforceable,<sup>22</sup> many Jewish families moved to the neighborhood, as evidenced by the three large synagogues within walking distance of our house. In the late fifties and early sixties, blacks started moving to the neighborhood. Realtors sought to exploit whites' racial fear and turn a quick profit by "blockbusting"—buying cheap from whites with tales of declining property values that would come with black neighbors and selling dear to middle-class blacks eager to own these fine houses where they could not live before.<sup>23</sup> Happily, the blockbusters were not successful. The scheme that had worked so well in other places was foiled. Black and white lawyers, doctors, teachers, and businessmen organized and educated their neighbors to resist the blockbusters. They held potlucks, dances, and mass meetings. Their organization, Neighbors, Inc., still exists today.<sup>24</sup>

Our story, however, does not end happily ever after. We discover that the neighborhood public school, an easy walk from home for our children,

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21. See CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES 77, 94 (1959) (detailing how the local real estate board, the *Washington Evening Star* newspaper advertisement policy, and citizens' associations were "highly effective in maintaining racial residential segregation in the city," supported by decisions of the courts of the District upholding the validity and judicial enforcement of racially restrictive covenants for a period of twenty-five years); see also *Corrigan v. Buckley*, 299 F. 899 (D.C. Cir. 1924) (upholding racially restrictive covenants in the District of Columbia as neither unconstitutional nor contrary to public policy).

22. *Hurd v. Hodge*, 334 U.S. 24 (1948) (holding invalid the enforcement of racially restrictive covenants by the federal courts of the District of Columbia as a violation of the Civil Rights Act of 1866 and contrary to public policy); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

23. See MARVIN CAPLAN, *FARTHER ALONG: A CIVIL RIGHTS MEMOIR* 151-78 (1999) (describing the practice of blockbusting in Washington, D.C. neighborhoods and the efforts of a small group of citizens to thwart the speculators).

24. Neighbors, Inc. was founded in 1958 to foster and maintain integrated neighborhoods. Neighbors, Inc., *What Is Neighbors, Inc.?* (July 7, 1960) (unpublished document, on file with author) (listing the organization's goals as "[c]ommunity stabilization through education toward elimination of prejudice and discrimination and lessening of neighborhood tensions" and "[c]ommunity improvement by combating deterioration and assuring the best in educational and recreational facilities"). Today, the group operates as an umbrella organization with other community groups in Northwest Washington focusing on beautification of libraries and schools. Telephone Interview with Rosemary Reed, President, Neighbors, Inc. (Feb. 25, 2004). See generally CAPLAN, *supra* note 23, at 161-78 (recounting Neighbors, Inc.'s origins and early years as described by the first president of the group).

does not reflect the neighborhood's demographics. In the 1970s, Shepherd Elementary was as fully integrated as the residential area surrounding it. Not surprisingly, given its active, educated, demanding parent body, it was one of the best elementary schools in the city, bar none. By 1992, when we arrived, it was essentially an all-black school. The white families in our neighborhood sent their children to private schools or used the school district's out-of-boundary process to enroll their children in elementary schools located in white neighborhoods on the other side of Rock Creek Park. Many of our black neighbors followed suit.

The seats vacated by our fleeing neighbors were filled quickly with children from families who lived outside of Shepherd's geographic district. Ambitious black parents from middle-class, working-class, and poor neighborhoods used the out-of-boundary process to escape their own local public schools and give their children a better chance at a school with a reputation for good teachers and involved parents.<sup>25</sup> Now almost eighty percent of the children in our neighborhood school live outside the neighborhood. Shepherd was at once the victim and beneficiary of a competitive system where parents felt they must use whatever economic and social capital they could muster to maximize the educational opportunities of their own children. While the doctors, lawyers, and professors in our neighborhood scrambled to find places at schools in wealthy white neighborhoods across the park, black teachers, bookkeepers, firefighters, and computer technicians dressed in their Sunday best for admissions interviews with the principal at Shepherd Elementary.

#### B. *A Dream and a Plan*

Our first child will not be born for another year and a half, but Mari and I know we want to send her to Shepherd Elementary. We chose this neighborhood because it was integrated. We want to raise our children in a community where they will learn the lessons our parents taught us—to value difference, to know firsthand the gifts that all people bring to the human enterprise, to understand the wrongs of racism and discrimination against the poor, and to experience the reward of working with others to set things right. Our neighbors have joined together to oppose the racist fear mongering of blockbusting and resist residential white flight. This seems a good place to start the work of reintegrating our neighborhood public school.

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25. See the discussion of the out-of-boundary process *infra* notes 91-93 and accompanying text.

During the next three years two babies arrive at our house. They grow more quickly than seems possible, and too soon they are in preschool, real people with their own personalities, gifts, and vulnerabilities. We are working parents, and, in the small spaces our busy lives allow, our conversation invariably turns to our children's future and to their future school. Somehow in the course of these cramped and often interrupted conversations we hatch a plan of sorts. We will find out everything we can about the school. We will meet and talk to our neighbors, especially those with small children. We will share our ideas, our ideals, the information we gather, our doubts, fears, and frustrations. We will find allies among our new neighbors, co-conspirators who share our belief in the importance of public schools and integration. If we can persuade enough families in this relatively privileged community to send their children to Shepherd, we can create a model integrated urban school where black and white children, middle-class, working-class, and poor children, will learn with and from one another, as will their families. If not the perfect school for our children, it will be a good enough one. Our neighborhood school will serve as an example to others of what too many people believe impossible.

The challenges become apparent early on. On our own block there are three families with children of school age. None is enrolled in a public school. We learn that Shepherd has a popular prekindergarten program and some very good teachers in the early primary grades but that many parents move their children to other schools when they reach the third or fourth grade. One neighbor tells us that her son and daughter had attended Shepherd until one of the son's teachers suggested she move them to another school because they were bright, high-achieving children.

As we talk to colleagues and friends it becomes apparent that middle-class parents in every section of the city have given up on the public schools. The causes leading to the deterioration of the city's public schools are complex, but there is little doubt that the school district's reputation as a failing system is well earned. Each day we open our *Washington Post* to find reports of mismanagement, fire code violations, shootings, uncertified teachers, and appallingly low test scores. Congress has created a control board to replace the elected school board, and there have been three different school superintendents during the three years we have lived in D.C. Many parents do not distinguish between the conditions in their local school and those in the District as a whole. Others worry that even if they can find a good elementary school they will not be able to find a satisfactory middle or high school. In an increasingly tight market for seats in the best private schools, it makes sense to secure one of those seats now rather than take one's chances later.

Mari and I are firm in our decision to send our children to the local public school, but we are far from certain about that decision's wisdom. Like all parents, our dreams for our children are without limit. Liberal parents often say, "We just want our children to have options." Of course, this really means they want them to have a choice between Harvard, Yale, Swarthmore, and Juilliard. We are not immune from this parental disease of ambition for one's children. We understand the strength and intimacy of a parent's bond with his or her child. What parents want most in a school is a place where their child is safe and treasured, her talents recognized and nourished, where she loves to go to school and learns to think of herself as competent in that universe. And parents want a school where they, the parents, are listened to and taken seriously. All parents want this from their children's school, and privileged parents believe it is their entitlement.

C. *"Nobody's Business but My Own": Talking with Friends and Neighbors and the Unspoken Subtext of Race*

Our eldest child is four. It is the spring before she will enter the prekindergarten class at Shepherd Elementary, and our neighborhood is ablaze with magnolia, dogwood, cherry, and azalea blossoms. We walk the neighborhood with flyers announcing a meeting of Shepherd Park Parents with Young Children (SPPYC). The meeting will be held at our home. The flyer invites neighbors for coffee, bagels, and a chance to meet and talk with other neighbors with young children. This is SPPYC's third coffee-and-bagels event. Neighbors have organized and hosted the two previous gatherings. About two dozen families attended each. We collected phone numbers, addresses, and e-mail addresses. There was no stated agenda other than to provide neighbors with young children a chance to meet and talk about common concerns. Mari and I offered to host the third event. We plan to introduce the subject of our local public school and use this as an opportunity to recruit people to the cause.

It feels good to be out in the neighborhood knocking on doors. Invariably people are friendly and open. But even at this early stage in our efforts I experience ambivalence as I approach my neighbors. I am certain of our purpose, and it is easy enough to express my own enthusiasm about the idea of neighbors coming together to make a common commitment to the school. Nevertheless, I find it more difficult to press other parents about their plans for their own children, particularly if they say that they have already decided not to send their child to Shepherd. One parent plans to sell his house and move to Maryland before his son reaches school age, and I hesitate to push further on the subject or even ask why. Something tells me that another parent's decision about where to send his children to school is

his own business and none of mine. I know how strongly Mari and I feel about our choices for our own children. Our first priorities are their happiness and welfare and teaching them values that we cherish. We would not gladly accept another's judgment in these matters. Yet how will parents and neighbors discover common values and identify collective responsibilities if conversation about how we raise our children is taboo?

So we press the conversation with our neighbors as much as our discomfort will allow. And in our morning of leafleting we find several families who are still weighing their options, anxious for more information and a chance to talk with others in the same boat. We also discover several families with children already attending Shepherd. We like them immediately. They are upbeat, smart people with progressive politics and a sense of humor.

We are pleased at the turnout for "Coffee and Bagels at the Matsuda-Lawrences'." About forty adults and their children fill our first floor. When the time seems right, I call our guests into the dining room and ask everyone to introduce him- or herself and say why they have come. I lead off, explaining my goals in inviting them in a quite direct way. I tell them why we moved to this neighborhood and how much we love it. I tell them what I have learned about the school—that it was once a great school and is now a good one; that many of our neighbors have decided to send their children to private schools or public schools across the park; and that others have stayed, some of whom are here and can answer questions. I tell them that Mari and I are planning to send our children to Shepherd and hope we can encourage a whole bunch of them to join us. If enough of us keep our children in the public school we can make it a wonderful school again. The research on class-integrated schools shows that poorer children's scores will improve and that our kids will not suffer academically.<sup>26</sup> Mari and I attended public schools that were hardly considered elite, and we have managed quite well in the academic world. We believe that the friendships we made in public school, across class and race divisions, and the social skills and values we learned are invaluable. My guess, I tell them, is that many of them had the same experience. Some heads are nodding, but I know that others are thinking, "That was then. Things are more competitive now."

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26. See RICHARD D. KAHLENBERG, *ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 41* (2001) (describing "'Coleman's Law,'" one of the central findings of James Coleman's 1966 report *Equality of Educational Opportunity*, which found that "blacks are twice as affected by school social environment as whites and that integration is 'asymmetric in its effects,' having 'its greatest effect on those from educationally deficient backgrounds,'" and noting that "[s]ubsequent studies have almost universally confirmed Coleman's findings regarding relative sensitivity").

As other parents introduce themselves and say why they have come, they speak candidly of their concerns about teacher quality, class size, curriculum, the condition of the building, test scores, and what they've heard about how much better the schools are across the park. No one mentions race. No one asks, "Will my child be the only white kid in the class?" But a tall, attractive, dark-haired white woman with a New York accent raises her hand to say she wants to respond to all the questions about the school's low test scores and lack of academic competitiveness. She says that her children attend Shepherd. She tells us of a sister in New York City who is sending her daughter to one of the city's fanciest private schools, and of her own daughter at Shepherd who is outperforming her New York cousin on every test. She never mentions race, but she is living evidence that white children and their parents can survive and even thrive in this nearly all-black school.

SPPYC meets once or twice more. We support a drive to keep the local library open and talk about a proposed pocket park and the need for a stop sign on 14th Street, but we do not meet again as a group to discuss the school. Somehow this conversation, with its unspoken subtext of race and segregation, is difficult to broach in a public space.

And even in more private spaces with friends it is not easy. That same spring, good friends who live close by tell us that in September they will send their son to a popular progressive private school that has recently relocated to a new campus in our neighborhood. Their son shared a play group with our daughter before either of them could walk. His mom grew up in the neighborhood and attended Shepherd when she was a child. Over dinner we parents often talked of racism, peace, and the trials and joys of raising our children. We also talked of Shepherd Elementary and our dreams for our local public school. They say they have decided that the progressive philosophy and teaching style of the private school are a better fit for their son, a free-spirited, nonconforming child. We know that they are right, that their son would feel like an outsider at Shepherd and that he would not find public school an easy place to be. This might well be the choice that we would make were we in his parents' shoes. But we are disappointed, nonetheless, I think as much in ourselves as in them. We never speak directly to these good white people about their choice, about how much race has affected their decision, or whether there is something we might have done together with other friends and neighbors that would have allowed them to make a different choice. This is about their child. It is a private space.

#### D. *Who Said It Would Be Easy?*

September comes. We are sitting in the Shepherd auditorium. The room is packed. We watch as each class is called to the front to meet their teacher. Gorgeous children, every shade of brown, scrubbed and oiled and coifed and wearing their back-to-school finest, hug and kiss last goodbyes to parents, grandparents, and toddler siblings. Eight or ten pink faces, looking very much at home amid this sea of brown, greet old friends with the idiom and inflection of their black classmates. The five or six white parents in the crowded room appear almost as much at ease as their offspring, chatting and laughing with other adults and hugging their children's classmates. They are integration's veterans, white people inoculated against fear of blackness by crossing racial boundaries and making friends.

There is not one white child in our daughter's prekindergarten class. Given our initial dreams we might well have been disappointed and discouraged. But what we feel most is excitement, a mixture of anxiety and expectant optimism. We discover that Shepherd is a lovely school, despite white flight, despite broken toilets; a leaky roof; and a crowded, noisy basement cafeteria. There is much in the culture and curriculum of this school and much in the bureaucracy of the system that we would change, and each day presents another challenge. But beyond the problems we have found wonderful, caring, creative, and sometimes brilliant teachers for our children, and the vibrant and diverse families at Shepherd have become our friends.

#### II. WHAT ARE WE AFRAID OF?: THE UNSPOKEN RACIAL TEXT OF CONTEMPORARY WHITE AND UPPER-MIDDLE-CLASS BLACK FLIGHT

A green and gold sign in front of the school reads, "Shepherd Elementary, A Jewel of a School." The glass-enclosed bulletin board below announces, "Open House, March 10, Welcome Parents." Twice a year the school invites parents to come to the school to visit classrooms while school is in session. The primary purpose of the open house is to give prospective parents a chance to see the school. Neighborhood parents come to the school for one last look before they make the ultimate decision about whether to send their children to private school or apply for an out-of-boundary exception to attend a school in a white neighborhood across the park. Many black families from beyond Shepherd's geographic boundaries visit with hopes that they will win a place here for their child in the out-of-boundary process.



Parents with children already attending Shepherd use the open house to check out our children's teachers for the coming year. But most of us know the teachers well. The school is small (two classes at each grade level from prekindergarten to sixth grade). The parent grapevine quickly spreads the word about gifted, caring, inspirational teachers and about the teacher who is mean spirited, burned out, or not very bright. We've seen which teachers give each girl and boy a goodbye hug at 3:15, which teachers will stop and stoop down to console the crying first-grade child or gently and firmly remind the sixth-grade boy to remove his hat. We know which teachers fill their classrooms with books, science projects, and art materials that the school district does not provide. We do not need to see the standardized test results to know which teacher expects every child to read and sees that each finds a way to meet her expectations.

A gaggle of sixth graders greets me at the front door, four girls and three boys dressed in white blouses and shirts and dark skirts and slacks. "Hi, Dr. Lawrence," says a smiling girl, pushed toward me by her fellow greeters. She hands me a green flyer with a map of the school and the names of the teachers identified by the grade they teach and the room number of their classroom. "May I help you find your way to a classroom?" she asks, following the scripted greeting and smiling again to show that she knows I know my way around. I am pleased with and proud of these well-groomed, well-coached, giggling greeters. Their genuine warmth and enthusiasm shines right through their manners, and I feel certain that they will make a good impression. If I were a new parent, I'd be thinking, "I want my child to go to school with kids like this."

But as I walk away from them and turn the corner at the end of the hall, I realize that today I am looking at the school through a new parent's eyes. I am more worried than I want to admit about the school's appearance, about the slight smell of disinfectant in the hall, about the broken panes of glass replaced by yellowing plastic and the worn stairways. I am thinking about the white parent who may look at that beautiful bunch of sixth graders at the door and see only their blackness, that not one of them is white. I worry that even a black parent, a doctor or a law professor like me, will look at Shepherd and be fearful of sending his child here. I am on the lookout for these parents who look into classrooms with apprehensive eyes and wonder if their son or daughter will be safe in this place, if he or she will have friends, be cared for, and be treated like a budding genius. I want to meet them, to introduce myself, and reassure them that there is nothing here to be afraid of. Like those children at the front door, my dress, manners, and speech must counter the multitude of scary images of blackness that populate America's history and culture. I worry that I may not be up to the task. For I too know these fears.

### A. *The Fear of Blackness*

What are we afraid of? I begin with the fear that is hardest to face. It is difficult to speak about this fear because it requires us to think about racism in its crudest, most elemental form. If we fear for our child because most of the other children in her school are black, it is likely that this fear is caused, at least in part, by a fear of blackness. We have internalized a set of beliefs about African Americans that has its origins in racist ideology—that black people are lazy, dirty, savage, impulsive, oversexed, or any number of other scary things.<sup>27</sup> We are all frightened to some degree of things and people we do not know, but racism involves a particularly invidious form of fear of the other. None of us wants to think of himself as capable of this kind of thinking, much less admit that he would allow such thoughts to affect his behavior. Our natural inclination is to deny these beliefs and thus deny the fear of blackness.<sup>28</sup>

Our meetings of Shepherd Park Parents with Young Children were always well integrated, with at least as many white parents as black, and some interracial couples. White families easily introduced themselves and engaged in animated conversations with their newfound neighbors, black and white. At the school's open house there are far fewer white faces. I see only five white visitors as I visit classrooms. Two of them appear to have black spouses. I imagine these white parents thinking, "If I send my child here, he may well be the only white child in his class." Often when I speak with white parents about the possibility of sending their child to an urban public school they mention their concern for the child's safety.<sup>29</sup> More often they say that while they would like their child to attend an integrated school, they do not think he would prosper where no other child looks like him. I wonder if they realize that for much of my childhood I was, more often than not, the only black child in my class. I am certain that my parents were also worried about my racial isolation, but when white parents express these concerns I sense that they are afraid, afraid not just for their child's

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27. See generally CATHERINE SILK & JOHN SILK, *RACISM AND ANTI-RACISM IN AMERICAN POPULAR CULTURE: PORTRAYALS OF AFRICAN-AMERICANS IN FICTION AND FILM*, at vii (1990); Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1261-75 (1992).

28. I have argued previously that Americans "share a common historical and cultural heritage in which racism has played and still plays a dominant role. . . . To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of [or deny] our racism." Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987).

29. See Jay Mathews, *At Middle School Level, Private Versus Public Hits Home*, WASH. POST, Jan. 26, 1998, at B1 (describing the choice confronting Linda and Dana Lawhorne, parents and longtime residents of Alexandria, Virginia, who reject being labeled as "middle-class white parents fleeing a multiracial urban environment" but are nonetheless considering a move to Fairfax because of their concern that their local Alexandria middle school is unsafe).

academic opportunities, but of the black children who would be his classmates and of those children's black parents.

Here I should reiterate a point that I have made elsewhere at some length.<sup>30</sup> I believe that we are all racists, that we share a common history and culture where racism has played and still plays a central role. This shared experience shapes ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. None of us is exempt from the wages of America's racism.

We also share a belief in and commitment to racial equality, and for the most part we are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. As our culture has rejected racism as immoral and unproductive, hidden or unconscious prejudice has become the more prevalent form of racism.<sup>31</sup> I have argued that we should think about racism as a disease rather than as a crime. Our conversations about why some of us feel we cannot send our children to black schools might be easier if we could admit these fears to ourselves and others without fear of judgment and condemnation. If we could talk about our fears of blackness we might find ways to confront and alleviate them. But these remain forbidden conversations.<sup>32</sup> We cannot speak with friends and neighbors of their fear of blackness because we do not want to call them racists.

#### B. *The Fear of Having One's Children Treated like Black Children*

"I visited the school and looked in the girls' bathroom. The toilet seat was missing." One of our neighbors is explaining why she will not send her daughter to Shepherd Elementary and has instead entered the out-of-boundary lottery in hopes of placing her in a school in a white neighborhood west of the park. She is a black professional, a community activist, and a leader in the fight to close down an open-air drug market down the street from her home. Her fear is not so much a fear of black children as it is the fear of having her children mistreated because of their

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30. Lawrence, *supra* note 28, at 322.

31. *Id.*; see also Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733 (1995); Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009 (1995); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

32. For a discussion of how our reluctance to talk about race and racism undermines antidiscrimination efforts, see Charles R. Lawrence III, *The Epidemiology of Color-Blindness: Learning To Think and Talk About Race, Again*, 15 B.C. THIRD WORLD L.J. 1 (1995).

proximity to other black children who are being mistreated. She knows that because the children who attend the school are mostly black, it is not likely that the toilet seat will be replaced. It is likely that there will be fewer experienced and qualified teachers, fewer books, fewer computers, and fewer science and math labs.<sup>33</sup> Chances are there will be no kiln to fire a child's clay pot, no violins and cellos to outfit an orchestra. But more than these material inequalities, she fears that the school system, the teachers, and even the parents will expect less of the children in this school than of the children in the school in the white neighborhood across the park. She fears that the teachers will expect her child to speak "black English"<sup>34</sup> and that they will assume she will learn to read slowly if at all.<sup>35</sup> She worries the school will look for hyperactive boys and brace for sullen, sassy girls. At the open house the principal stressed "classroom management" and said nothing about creative teaching methods or programs for gifted children. She is afraid that on the first day of school, when her child's kindergarten teacher looks around the circle of bright, scrubbed faces, she will expect that most of the class will not go to college, rather than imagine that she is teaching a roomful of future doctors, lawyers, and CEOs.

One of the products of racism and segregation is that poor black children are treated very differently than the children of highly educated white parents. Jean Anyon, Lisa Delpit, Ray Rist, and others have studied how teachers' attitudes toward poor, minority children reproduce the race and class stratification in American society.<sup>36</sup> In ethnographic studies, these

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33. See THE EDUC. TRUST, WHERE ARE WE NOW?: KEY FACTS ON THE ACHIEVEMENT GAP (2003), available at <http://www2.edtrust.org/NR/rdonlyres/14FB5D33-31EF-4A9C-B55F-33184998BDD8/0/masterach2003.ppt>. This presentation catalogues indicators of the disparate treatment of minority students, including the fact that "poor and minority students have less access to high level curriculum," *id.* at 71, quality teachers, *id.* at 93, and funding, *id.* at 101.

34. See, e.g., THE REAL EBONICS DEBATE: POWER, LANGUAGE, AND THE EDUCATION OF AFRICAN-AMERICAN CHILDREN, at xiii (Theresa Perry & Lisa Delpit eds., 1998) (presenting "background history that excavates the race and power dynamics surrounding the development" of Ebonics); Lisa Delpit, *Ebonics and Culturally Responsive Instruction*, in RETHINKING SCHOOL REFORM: VIEWS FROM THE CLASSROOM 79, 87 (Linda Christensen & Stan Karp eds., 2003) (advocating that teachers use culturally responsive instruction to "provide access to the national 'standard'" of Standard English while appreciating the language children speak).

35. Ray Rist has observed that school administrators and faculty assume that middle-class children can learn and lower-class children cannot. Acting on assumptions made on the basis of children's skin color, dress, speech habits, and other cultural signals, educators create self-fulfilling prophecies about the capabilities of students that contribute to the achievement gap between high- and low-income students. RAY C. RIST, THE URBAN SCHOOL: A FACTORY FOR FAILURE: A STUDY OF EDUCATION IN AMERICAN SOCIETY 18-21, 241-48 (1973). Rist argues that these expectations create an "ideology of failure" that permeates the school and the members of the school community. *Id.* at 62.

36. Anyon conducted case studies in five schools serving different socioeconomic populations and found that "[s]chool experience . . . differed qualitatively by social class." Jean Anyon, *Social Class and the Hidden Curriculum of Work*, in TRANSFORMING URBAN EDUCATION 253, 273 (Joseph Kretovics & Edward J. Nussel eds., 1994); see also RIST, *supra* note 35; Delpit, *supra* note 34.

authors have observed the daily processes in schools and found that, based on race and class, educators make assumptions about the capabilities of their students that affect both subtle and overt interactions and expectations as well as the curricular, pedagogical, and pupil-evaluation practices they employ.<sup>37</sup>

So my neighbor's fears are well founded if they reflect her knowledge of what most often happens in schools where there are a significant number of poor and working-class black children. But the conversation I want to have with her would not end here. I want to talk with her about Shepherd Elementary and the complex ways that her fears might be, at the same time, warranted and unwarranted. I want to tell her about the several skilled, inspired, creative, caring teachers who have taught our children here and who say that they have recognized and nurtured each of my children's unique genius. I want to speak candidly about the handful of teachers I would like to be rid of and admit that Mari and I have used our privilege to keep our children out of their classes. I want to tell her that when enough parents like her enroll their children at the school, the toilet seats, broken windows, and leaking roof will be fixed more quickly. We will insist that the school hire only highly skilled and creative teachers who expect much from our children and treat them with care and respect. We privileged parents with significant social capital need not comprise a majority to change the culture. Working-class and poor parents at Shepherd have shown that they too are ready to make demands. I want to be truthful about what worries me most—that many of us have been beaten down by the constant and unrelenting message from the larger culture that says we should expect little from black children and from their teachers and parents. I worry that over time we will begin to internalize the message and give up fighting against it. (With each passing month and year we lose a little of our outrage at the unfixed toilet and the teacher who cannot make her subjects and verbs agree.) We are fearful that we cannot win this battle for all children, and so we retreat in an effort to save our own.

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37. For example, Anyon observed that in a working-class school "work is following the steps of a procedure," Anyon, *supra* note 36, at 259, that is "appropriate preparation for future wage labor that is mechanical and routine," *id.* at 272, while in a middle-class school, "work is getting the right answer," *id.* at 262. In an affluent professional school (where the parent population is predominantly professional), work is a "creative activity carried out independently. The students are continually asked to express and apply ideas and concepts." *Id.* at 264. In an executive elite school (where "the majority of the families belong to the capitalist class"), *id.* at 258, "[c]hildren are continually asked to reason through a problem[ and] to produce intellectual products that are both logically sound and of top academic quality," *id.* at 268.

C. *The Fear That One's Child Will Not Fully Develop Her Gifts or Will Lose the Race for Privilege*

I began this article by describing an exchange with a colleague, a new parent who was already worrying about where his child would go to college. It is hard to imagine a parent who does not look at his child and imagine who he or she will be ten and twenty years from now. We watch their budding gifts: the way she draws a picture or solves a puzzle, his perfect pitch and poetry, her passion for musical theater and his for bridges, the way he makes the throw from third, her crossover dribble. We watch how quickly and joyfully they learn when they are toddlers on the playground, and we wonder if they will know teachers who will show them how to love Matisse, Romare Bearden, Puccini, Ellington, Whitman, Adrienne Rich, and the puzzles of microbiology and quantum physics. Our greatest fear is that no teacher will see the budding scientist, dancer, or CEO or that no teacher will have the skills, talent, experience, or passion to nurture and discipline these gifts. In a world where knowledge, teaching, and learning are increasingly commodified and stratified, where only those children whose parents can pay will touch a cello, read James Joyce, or see a cell divide beneath a microscope, we realize that we are in a cutthroat competition with other parents to secure the place in the preschool that promises the inside track to the Ivy League. We hear a colleague quietly boasting of a daughter admitted to Yale or Amherst, and we fear our child will be left out, that the promise of her gifts will go unrealized and that it will be our fault. We may disagree in principle with an education system that preserves class hierarchy, but if it's the only game in town and our children are at stake, it's just too scary to opt out.

D. *The Fear of Loneliness in the Hard Work of Raising Children*

They say it takes a village, but parents know that raising children in today's world is solitary work. Our own parents and siblings are as likely to live on the opposite side of the continent from us as they are to live across the street. Working parents hire nannies or leave their children with babysitters and childcare centers. Our homes and apartments turn inward toward backyards and family rooms equipped with high-tech multimedia centers. We may remember playing on neighborhood streets and sidewalks with childhood friends or riding a bike to the local playground, but those streets no longer feel safe for our own children.

When I speak of the loneliness of parenting I do not mean only that we are too often driving alone as we chauffeur children to soccer games and piano lessons. I am most concerned with the solitariness of our

decisionmaking about how we raise our children. When we choose a babysitter, a piano teacher, or a soccer league, when we decide whether our children will play with toy guns or how much TV they will watch, when we talk to them about drugs, war, racism, and sexuality, when we decide where they will go to school and ponder how that school should look and feel, we are too often alone. We may consult a friend or colleague, the Internet, or one of the burgeoning market of firms that for a fee will tell us the school where our child will fit best. But these are consultations in which we ask for information to place on our private list of pros and cons. We rarely speak to other parents about what we want for our children and what they need, about our values and how we can best convey those values to our children. We rarely ask for or offer help in this solitary task because there is an unwritten sign that says "private."

This loneliness is heightened where parents want to resist the fears that cause white and middle-class black flight from urban schools. As each white or middle-class black family decides on its own to leave Shepherd Elementary, those of us who remain grow more fearful of being left alone. When there is no conversation about that fear of loneliness with those who leave and among those who are left behind, the fear increases because of the uncertainty about who will leave next and how rapid the exodus will be. The forbidden conversation isolates us from one another and makes the hard and solitary work of parenting more solitary still.

### III. UNDERSTANDING AND MISUNDERSTANDING *BROWN* AND *PIERCE*: ON COMMUNITY AND PRIVACY

In our efforts to create an integrated school at Shepherd Elementary we encountered a dual challenge: to overcome the fear of blackness engendered by America's racism and to understand and empathize with the depth of intimacy between parents and their children. This Part asks whether *Brown v. Board of Education*'s commitment to including all children in the community and *Pierce v. Society of Sisters*'s protection of family autonomy and intimacy can be reconciled in the context of school segregation and white flight. I consider the implications of Ely's "process defect" theory for meeting the challenge of this reconciliation.

#### A. *Brown v. Board of Education: A Case About Public Education and Community*

*Brown v. Board of Education* is a case about citizenship, community, and the special role that public education plays in defining and creating community. At the start of the opinion, the Court tells us that the plaintiffs,

Negro children, "seek the aid of the courts in obtaining admission to the *public schools* of their *community* on a nonsegregated basis."<sup>38</sup> The Court's juxtaposition of "public schools" and "community" is not coincidental. Of course the plaintiffs' claim in *Brown* was about more than exclusion from schools. It was a claim for citizenship, a claim for belonging, for full membership in a community. But the plaintiffs chose public education as the beachhead for their attack. They understood, as ultimately did the Court, the peculiar relationship between the institutions a community creates to educate its children and the creation of community itself.

A community creates common schools in recognition of the need to convey knowledge, culture, and skills to its children as well as to transmit values and create relationships. Schools create community because they take the private act of parental care and entrust it to the collective.

Much of Chief Justice Warren's remarkably brief opinion in *Brown* is dedicated to a discussion of public education. The opinion considers public education's history as part of its discussion of whether the Framers of the Fourteenth Amendment intended to outlaw segregation in public schools. The Court found that at the time the Fourteenth Amendment was adopted the movement toward free common schools had not yet taken hold, noting that in the South, "[e]ducation of white children was largely in the hands of private groups," while "[e]ven in the North, the conditions of public education did not approximate those existing today."<sup>39</sup> The Court then explained that it "must consider public education in the light of its full development and its present place in American life throughout the Nation."<sup>40</sup> The Court's pronouncement on this question is central to its holding:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities . . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.<sup>41</sup>

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38. *Brown v. Bd. of Educ.*, 347 U.S. 483, 487 (1954) (emphasis added).

39. *Id.* at 490. In a footnote, the Court noted that "[c]ompulsory school attendance laws were not generally adopted until after the ratification of the Fourteenth Amendment, and it was not until 1918 that such laws were in force in all the states." *Id.* at 490 n.4.

40. *Id.* at 492-93.

41. *Id.* at 493.



*Brown* only makes sense in the context of this finding of a widespread commitment to public education. If the vast majority of white citizens—the people who mattered and were listened to in the community—did not support and rely on public schools to educate their own children, those schools would not have played this central role as a marker of community membership or citizenship. Today, when large numbers of privileged parents withdraw from urban public schools, they change or move this marker of community membership, and black children are once again excluded.

The moral mandate of *Brown* is that all children in this country have a right to full membership in the community and to the community resources that membership brings. It cannot be that this moral mandate no longer holds simply because the walls that deny them access are built between poor black children in urban public schools and privileged white children in private schools and exclusive suburbs.

Today we often think of the moral of *Brown* as about improving test scores for poor children rather than about integration. Vouchers, charter schools, Edison Schools, and the No Child Left Behind Act all offer educational reform for poor minority children with no direct attention to race or class integration. But equality of education cannot be achieved in segregated schools. This is not because black children must sit next to white children in order to learn.<sup>42</sup> Schools must be integrated because segregated schools build a wall between poor black and brown children and those of us with privilege, influence, and power. The wall denies them access to the resources we command: social, political, and economic. Although the wall is not a physical structure or a prohibition mandated by law, it nonetheless permits and encourages us to hoard our wealth on one side while children on the other side are left with little. The genius of segregation as a tool of oppression is in the signal it sends to the oppressors—that their monopoly on resources is legitimate, that there is no need for sharing, no moral requirement of empathy and care. The children on the other side of the wall are not our own. They are not kin to us. They may not even belong to the same species. They are different from us in essential, unchangeable ways.

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42. See *Missouri v. Jenkins*, 515 U.S. 70, 121-22 (1995) (Thomas, J., concurring) (“[T]here is no reason to think that black students cannot learn as well when surrounded by members of their own race as when they are in an integrated environment.”). But see John A. Powell, *Living and Learning: Linking Housing and Education*, in *IN PURSUIT OF A DREAM DEFERRED: LINKING HOUSING AND EDUCATION POLICY* 15, 17 (John A. Powell et al. eds., 2001) (stating that, counter to the critics who argue that “separation of the races may be the only means of creating adequate educational opportunities for poor, minority children,” *Brown*’s dictate that “separate is inherently unequal continues to ring true,” and that “[a]n exploration of the educational conditions that children face within segregated schools and neighborhoods demonstrates that such a system does not serve the needs of students and the larger society”).

They do not belong to our community. This is the meaning of *Brown's* observation that segregation is inherently unequal.<sup>43</sup>

*Brown*, then, is not only about access to resources; it is about the creation of community itself. The affirmative act of integration, the movement from dual to unitary, is required for the transformation from an established ideology and structure that excludes and demeans black and brown children to one that values and cares for them as members of the larger community.<sup>44</sup> As the community's chosen instrument for the creation and nurture of mutual relationships and the transmission of values, culture, and knowledge, "public" education creates community and defines its bounds. The transformation of society envisioned by *Brown* cannot be achieved when the location of societal transformation is not held in public trust.

#### B. *Brown and Ely's Process-Defect Theory*

I have argued here that *Brown* finds segregated schools inherently unequal because they signal the exclusion of black children from the community of persons for whom democracy's decisionmakers feel attachment, empathy, concern, and a moral duty of care. Segregated schools were, and remain, part of a larger ubiquitously segregated culture that signals blacks' nonmembership and exclusion from participation in the democratic community of self-governors. Ely's explanation for why segregated schools violate the constitutional value of equality shares considerable common ground with my own. We both identify racism, or racial prejudice, as a lens that distorts, blinding us to overlapping interests, mutual benefits and burdens, and ultimately our common humanity.<sup>45</sup>

But I differ from Ely in my understanding of why this distortion implicates the Constitution and in what I think the Constitution commands that we do about it. Ely's theory assumes that the democratic process functions quite well, for the most part. Racial classifications are worrisome

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43. *Brown*, 347 U.S. at 495.

44. See Charles R. Lawrence III, *Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819 (1995) (providing a transformational view of equal protection focusing on community rather than individual injustices).

45. Ely's representation reinforcement theory explains when and why the democratic process fails, signaling the need for judicial intervention. Ely sees African Americans as the paradigmatic discrete and insular minority. Racial "prejudice is a lens that distorts reality," ELY, *supra* note 20, at 153, curtailing the political process by blinding us to overlapping interests and causing legislators to misapprehend the costs and benefits of legislation to groups whose welfare they value negatively, *id.* at 157. Strict scrutiny of suspect classifications is a justifiable exception to the general rule of judicial restraint because of the defects that prejudice causes in the legislative process.

for him because they raise suspicion about improper motive.<sup>46</sup> Strict scrutiny is needed to ferret out legislation that distributes benefits and burdens because of hatred or disregard of those people who belong to a vilified minority. Although he recognizes that prejudice against blacks is widespread,<sup>47</sup> he sees the process defect of racial prejudice as exceptional and aberrant. Racial prejudice is caused by bad actors who intentionally violate the community ideal of human equality.

I view racial prejudice not as the acted-on belief of societal outliers but as a manifestation of the well-established and deeply entrenched community value of racism or white supremacy. Racism, once embraced and articulated in the Constitution and rejected with the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, remains vital and ubiquitous.

### 1. *Unconscious Racism Revisited*

I first noted my agreement with Ely's insight about racism's distortion of democratic process in *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*.<sup>48</sup> There I said I thought Ely's process-defect theory did fine as far as it went, but that in failing to take unconscious racism into account it had not gone far enough.

Under present doctrine, the courts look for Ely's process defect only when the racial classification appears on the face of the statute or when self-conscious racial intent is proven under the *Davis* test.<sup>49</sup> But the same process distortions will occur even when the racial prejudice is less apparent. Other groups may avoid coalition with blacks without being aware of their aversion to blacks or of their association of certain characteristics with blacks. "Likewise, the governmental decisionmaker may be unaware that she has devalued the cost of [her decision to] a group with which she does not identify . . . . Indeed, because of her lack of empathy with the group, she may have never even thought of the cost at all."<sup>50</sup>

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46. See *id.* at 145. For Ely, the doctrine of suspect classifications "function[s] as a handmaiden of motivation analysis," *id.*, wherein the heightened scrutiny required to uphold laws affecting a suspect class effectively "flush[es] out" laws motivated by "a simple desire to disadvantage the minority in question," *id.* at 146-47.

47. See *id.* at 135.

48. Lawrence, *supra* note 28, at 344-55. In that article I advanced the argument that courts ought to consider the effect of unconscious racism on government decisions when they interpret and apply the Equal Protection Clause. In part, I asked what wrong the Equal Protection Clause—and more specifically the suspect classification doctrine—sought to address. I considered two theories that offered an answer to that question: the process-defect theory and the stigma theory.

49. See *Washington v. Davis*, 426 U.S. 229, 239-48 (1976).

50. Lawrence, *supra* note 28, at 347.

Ely was persuaded by my argument. He could find no fault in the logic that if conscious racial prejudice distorted legislative judgment, then unconscious racism was likely to produce the same distortion.<sup>51</sup> However, I am almost certain that he disagreed with me about what one should do with the implication of unconscious racism for his theory. The cultural meaning test, an interpretive method I proposed for identifying the presence of unconscious racism and triggering strict scrutiny,<sup>52</sup> would require striking down a good deal more legislation than Ely would think appropriate.<sup>53</sup> Given his clear-eyed view of the continuing prevalence of racist beliefs among Americans, he was faced with a suggested augmentation of his theory that would cause the process-defect exception to swallow up his commitment to judicial restraint. Ultimately, Ely resolved this difficulty by ignoring it.<sup>54</sup>

When I ask about the fears that motivate white and middle-class black flight, I hear an unacknowledged subtext of race. White and middle-class black parents express concern for their children's safety, even in elementary schools where there is no real threat of violence. They worry about their children's discomfort with "being different," or that the curriculum is not well suited to their children's needs. They see leaky ceilings and broken toilets and think, "I cannot send my child to this school." They worry that if they do choose to send their children to this school, they will find themselves all alone, without a community of like-minded parents. These fears are real, and they are experienced as the rational reactions of caring

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51. I was a visiting professor at Stanford when I began writing *Ego*, and John Ely was the dean. He was one of the first colleagues to read an early draft of the piece, and I recall him saying, "Of course you are right about my theory, Chuck." I have found nothing in his later writing where he commits this to print.

52. Lawrence, *supra* note 28, at 355. The cultural meaning test would evaluate governmental conduct to see if it conveys a symbolic message to which the culture attaches racial significance. The court would analyze governmental behavior much like a cultural anthropologist might: by considering evidence regarding the historical and social context in which the decision was made and effectuated. If the court determined by a preponderance of the evidence that a significant portion of the population thinks of the governmental action in racial terms, then it would presume that socially shared, unconscious racial attitudes made evident by the action's meaning had influenced the decisionmakers. As a result, it would apply heightened scrutiny. *Id.* at 356.

53. For example, Ely probably agreed with the Court's application of the intent requirement to uphold a facially neutral zoning law that disproportionately excluded African Americans in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). "There are many cities . . . whose residents are predominantly or even exclusively white . . . . To require, in the absence of proof of intentional discrimination, that they somehow be more nearly 'equalized' would be to take a step the Court has consistently refused . . . ." ELY, *supra* note 20, at 140.

54. I do not believe that Ely ever cited *Ego* or responded in print to the critique of his theory it contained. This is particularly notable given the prominence of his theory in my analysis and the fact that *Ego* is by far the most widely read and cited of my works.

parents. But they are also influenced by the distorting lens of prejudice, by irrational images and beliefs conceived and nurtured within a racist ideology and culture. The narratives in this article provide another setting to help us understand the impact of unconscious racism and to reiterate my original contention that Ely's process-defect theory must also include those cases in which prejudice operates outside of our awareness.

## 2. *The False Distinction Between Participation as Process and Participation as Substance*

Ely maintains that the Constitution is primarily concerned with process, or what he calls "participational themes." He reasons that while preserving liberty was a central intention of the Framers, the Constitution accomplishes this goal through its structure and provisions designed to ensure a fair decision process. He argues against judicial interpretation of the Constitution that identifies and freezes substantive values, saying that these values change over time and noting that a constitutional provision for amendment gives the citizens of a representative democracy the power to enshrine those values in the Constitution or to remove them.<sup>55</sup> Consistent with this core theme in his theory, he argues that the heightened judicial scrutiny of racism under the Equal Protection Clause is and ought to be based on process—a concern for fair access to democratic decisionmaking—rather than grounded in a substantive value. Ely makes clear that his justification is process based in the following passage:

It is inconsistent with constitutional norms to select people for unusual deprivation on the basis of race, religion, or politics, or even simply because the official doing the choosing doesn't like them. When such a principle of selection has been employed, the system has malfunctioned: indeed we can accurately label such a selection a denial of due process.<sup>56</sup>

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55. Ely contends that unelected judges are not in a position to determine the substantive values embodied in the Constitution, because this practice would conflict with the democratic underpinnings of the Constitution itself. ELY, *supra* note 20, at 4-5. Moreover, the Constitution "recognizes the unacceptability of the claim that appointed and life-tenured judges are better reflectors of conventional values than elected representatives, devoting itself instead to policing the mechanisms by which the system seeks to ensure that our elected representatives will actually represent." *Id.* at 102.

56. *Id.* at 137 (endnote omitted). In its pure form, the quest for procedural justice is utterly value-neutral in that it purports to separate rule application from questions of value. Tom Heller has noted that process theory "reflects the influence of liberal social theory which, for historical reasons, is committed to the positivist principle that it is not possible to philosophically compare the merits of competing normative propositions." Thomas C. Heller, *The Importance of Normative*

My own theoretical framework and the discussion in this article presume that the Reconstruction Amendments and the Equal Protection Clause embody a constitutional norm or value of antisubordination.<sup>57</sup> The meaning of this value can be understood only in the context of a culture, nation, and Constitution that for more than a century affirmatively embraced the values of slavery and white supremacy.<sup>58</sup> Thus, I believe the Equal Protection Clause does more than require that every individual have equal access to the democratic process and does more than grant blacks the right to treatment free of invidious racial motives. Rather, it creates a new substantive value of "nonslavery" and antisubordination to replace the old values of slavery and white supremacy.<sup>59</sup> Given the historical and cultural context of the Amendments' adoption, I believe the Constitution cannot be understood to establish these new values but not implement them. Such a reading renders the Amendments without substance. If the Reconstruction Amendments replace the constitutional value of slavery with the value of nonslavery, the Equal Protection Clause requires the disestablishment of the ideology, laws, practices, and structures that were put in place in service of

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*Decisionmaking: The Limitations of Legal Economics as a Basis for a Liberal Jurisprudence—As Illustrated by the Regulation of Vacation Home Development*, 1976 WIS. L. REV. 385, 388.

57. See, e.g., Charles R. Lawrence III, *Each Other's Harvest: Diversity's Deeper Meaning*, 31 U.S.F. L. REV. 757, 775-78 (1997); Lawrence, *supra* note 28; Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 [hereinafter Lawrence, *Hollers*]; Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 950-51, 962 (2001) [hereinafter Lawrence, *Two Views*]. Robin West has termed this substantive understanding of equal protection "progressive," and has named me among a small group of scholars who she says embrace a "progressive constitutional faith." Robin L. West, *Constitutional Scepticism*, 72 B.U. L. REV. 765, 797, 796-97 (1992).

58. See U.S. CONST. art. I, § 2, cl. 3 (amended 1868); *id.* art. I, § 9, cl. 1; *id.* art. IV, § 2, cl. 3 (repealed 1865); *Plessy v. Ferguson*, 163 U.S. 537, 559, 555-59 (1896) (Harlan, J., dissenting) (arguing that while the Constitution mandates equality, "[t]he white race deems itself to be the dominant race in this country"); *Scott v. Sandford (Dred Scott)*, 60 U.S. (19 How.) 393, 426-27 (1856) ("[U]pon a full and careful consideration of the subject, the court is of opinion, that . . . *Dred Scott* was not a citizen of Missouri within the meaning of the Constitution of the United States . . .").

59. Although Ely argues that the original Constitution was principally "dedicated to concerns of process and structure and not to the identification and preservation of specific substantive values," ELY, *supra* note 20, at 92, he lists slavery among the short list of values specifically protected. "[S]lavery must be counted a substantive value to which the original Constitution meant to extend unusual protection from the ordinary legislative process . . ." *Id.* at 93. Ely notes that that value was reversed with the adoption of the Reconstruction Amendments, which embodied a substantive judgment that human slavery is simply not morally tolerable. Thus at no point has the Constitution been neutral on this subject. Slavery was one of the few values the original document singled out for protection from the political branches; nonslavery is one of the few values it singles out for protection now.

*Id.* at 98.

slavery and white supremacy. It requires a reconstruction of the substantive societal conditions that slavery created.<sup>60</sup>

Ely rightly identifies the theme of participation as central to democracy and to the Constitution. The theme is reiterated in the Fourteenth Amendment, and the text, history, and cultural context of that Amendment make it apparent that participation means more than process. The theme of participation also calls our attention to status, or standing to participate. While lawyers often think of issues of standing as procedural in nature, the question answered in the affirmative by the Fourteenth Amendment—"Do former slaves have standing to participate in the democratic conversation?"—is clearly about status.<sup>61</sup> It is a question of substantive law. It is a question that asks how we are constituted. Will these people who were formerly excluded from "We the People" now be included? It is a question that is answered with a commitment to a moral value. And that value is, in Ely's term, nonslavery. The value of nonslavery commits us to ending relationships of subordination and abuse of power, whether those relationships and that abuse involve the government or private exploitation and coercion. It commits us to the affirmative disestablishment of a society founded upon the maintenance of slavery and the dehumanization and inequality that slavery required.

Ely's own discussion of the justification for the doctrine of suspect classifications illuminates how his process theory cannot be separated from the substantive value contained in the Fourteenth Amendment. Ely begins by noting that "special scrutiny," and "its demand for an essentially perfect fit, turns out to be a way of 'flushing out' unconstitutional motivation."<sup>62</sup> And what is that motive of which we are suspicious? In the case of "a law that classifies in racial terms to the disadvantage of a minority," it is the motivation "most naturally suggested by its terms, a simple desire to disadvantage the minority in question."<sup>63</sup> More generally, we are suspicious of "attempts to inflict inequality for its own sake—to treat a group worse not in the service of some overriding social goal but largely for the sake of simply disadvantaging its members."<sup>64</sup> Of course the disadvantages imposed on blacks by slavery were not "attempts to inflict inequality for its own sake" or motivated by a simple desire to disadvantage them. The laws and constitutional provisions that sustained and protected slavery were

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60. Elsewhere I have called this a "transformative theory" of equal protection and noted the distinction between liberal and transformative approaches. See Lawrence, *supra* note 44, at 824-25.

61. See JACOBUS TENBROEK, *EQUAL UNDER LAW* 201-39 (Collier Books rev. ed. 1965) (1951).

62. ELY, *supra* note 20, at 146.

63. *Id.* at 147.

64. *Id.* at 153.

adopted to serve larger social goals, including maintaining a source of free labor to sustain the Southern agricultural economy and negotiating the compromise between free and slave states that was necessary to the creation of the Union itself.<sup>65</sup> These were rational, legitimate, and even overriding goals until the Thirteenth, Fourteenth, and Fifteenth Amendments established the constitutional values of shared humanity, rights of participation, and antisubordination that rendered them insufficient justification.

Ely offers an apparently purely process-based psychological explanation for the need to specially scrutinize we/they classifications. The legislator will misjudge the accuracy of generalizations that suggest the relative superiority of those groups to which he belongs. "[T]he easiest idea to sell anyone is that he is better than someone else."<sup>66</sup> Mistake is more likely because of the psychic need to feel superior. But would mistake invoke special scrutiny if the goal of nurturing the psychic need to feel superior did not conflict with the constitutional value of antisubordination? The laws that sent blacks and whites to separate drinking fountains and swimming pools had just this purpose. And while *Brown* speaks of psychic injury to Negro children,<sup>67</sup> the flip side of this coin is segregation's illegitimate purpose of promoting psychic feelings of superiority in white children.<sup>68</sup> Thus, Ely's process argument for ferreting out mistake is premised on the prior substantive value of equal status and antisubordination.

Ely sees the participatory process of representative democracy as the Constitution's mechanism for defining and protecting other constitutional values.<sup>69</sup> He points to the Reconstruction Amendments as a chief example

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65. See, e.g., DERRICK A. BELL, JR., *RACE, RACISM, AND AMERICAN LAW* 22-58 (1973); PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* (2d ed. 2001); ERIC FONER, *THE STORY OF AMERICAN FREEDOM* 58-68 (1998); HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES* 97-101 (1980); Staughton Lynd, *The Compromise of 1787*, 81 POL. SCI. Q. 225 (1966).

66. ELY, *supra* note 20, at 158 (quoting GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 372 (1954)).

67. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.11 (1954).

[T]he policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.

*Id.* at 494 (second and third alterations in original) (internal quotation marks omitted).

68. For example, as late as 1955 the Supreme Court of Appeals of Virginia upheld that state's antimiscegenation law, noting that it served the "State's legitimate purposes" of "'preserv[ing] the racial integrity of its citizens'" and "prevent[ing] 'the corruption of blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride.'" *Loving v. Virginia*, 388 U.S. 1, 7 (1967) (quoting *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955)).

69. See ELY, *supra* note 20, at 88-101.



of the people's power to reconstitute themselves by repealing the value of slavery and authorizing the value of nonslavery. But it is not enough to give authority to this new value unless the authority requires the affirmative transformation of the beliefs, practices, and material structures that have buttressed the old value. The point of my first critique of Ely's theory was that unconscious racism is a vestige of the old value (slavery) that continues to distort the democratic process. Until the work of transformation from slavery to nonslavery is done there will always be process distortion; commitment to fair process means little unless we are also committed to the affirmative disestablishment of subordination.<sup>70</sup>

C. *Pierce v. Society of Sisters: The Limits of Liberty and Equality*

When parents decide to remove their children from troubled urban public schools, they do not think of themselves as engaging in white flight or participating in the creation of communities that exclude and demean blacks. As parents, we almost always act not because of enmity toward or disregard for others' children but because of deep love and concern for our own. The parent-child relationship is the most intimate of human interactions. Any parent who has nursed her infant, changed his baby's diaper, waited up at night for a teenager's return, or sat through a parent-teacher conference knows this truth. The Supreme Court has held that our Constitution embodies a shared value or moral consensus that privileges this relationship and protects it from governmental interference. The government may not tell us how to raise our children or what we may or may not teach them, unless it has some compelling justification such as protecting the children from neglect or abuse or ensuring the well-being of the larger community.

*Pierce v. Society of Sisters* was one of the earliest cases to recognize this constitutional value.<sup>71</sup> In *Pierce*, parochial and private schools brought suit to enjoin the enforcement of an Oregon statute that required all children to attend public school. The Supreme Court invalidated the statute on the ground that it "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."<sup>72</sup> The court held that the state could not "standardize its children by forcing them to accept instruction from public teachers only."<sup>73</sup> *Pierce*

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70. Elsewhere I have described the difference between the process theorists' approach to racial equality and my own. See Lawrence, *supra* note 44, at 823-25.

71. 268 U.S. 510 (1925).

72. *Id.* at 534-35.

73. *Id.* at 535. Some scholars have argued that *Pierce* is better understood as a First Amendment case. See Stephen Arons, *The Separation of School and State: Pierce Reconsidered*,

articulates a positive constitutional value that is often read to justify parents' choices to leave troubled public schools as a moral and legal right.<sup>74</sup>

The school choice movement has brought together a collection of unexpected bedfellows, including right-wing libertarians, liberal civil libertarians, religious fundamentalists, progressive alternative-school advocates, and home schoolers. All of these groups have looked to the holding in *Pierce* for legal and political arguments that parents have an inviolable right to choose the place and content of their children's schooling. For purposes of this discussion, however, I do not speak to the merits of applying *Pierce* in support of arguments for school choice. Rather, my intention here is to explore the shape and meaning of the moral value identified in *Pierce*—family intimacy and autonomy—to ask how that value shapes the way we think about integration, community, and our collective responsibility for children and to consider how we ought to weigh it in the context of our commitment to equality. Put most starkly, I want to ask whether, in a setting where parental school choice results in the hypersegregation of public schools, the liberty value from *Pierce* ought to trump the equality value from *Brown*, or vice versa.

When I urge white and upper-middle-class black parents not to flee the “black” urban public school and argue that the value of equality expressed in *Brown* gives moral, if not legal, authority to that plea, I must be prepared to answer the often unspoken, but deeply felt, response from *Pierce*: “Isn’t there an equally compelling value to democracy in the liberty to direct the education and upbringing of my own children, and aren’t you asking me to give up that liberty?” My answer is, “No. I do not believe that my plea for your participation in fulfilling the promise of *Brown* compromises the ‘liberty’ protected in *Pierce*.”

My answer comes from Critical Race Theory and from the larger body of antisubordination theory of which it is a part.<sup>75</sup> The moral value in protecting family intimacy and autonomy from the intrusion of the state

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46 HARV. EDUC. REV. 76 (1976); Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 888-91 (1979).

74. See Charles R. Lawrence III, “Justice” or “Just Us”: Racism and the Role of Ideology, 35 STAN. L. REV. 831, 841-42 (1983) (book review) (employing “strain theory” to show how a negative injury to blacks is turned into a positive right for fleeing whites).

75. Critical Race Theory focuses on the persistence of conditions created by and traditionally associated with racist practice. As opposed to liberal theory, which promotes the equality of individuals through process, Critical Race Theory promotes substantive equality as the result of legislative and judicial action. By reflecting the perspective of the subordinated, Critical Race Theory articulates a theory of equality and human dignity that is grounded in antisubordination principles. See Lawrence, *Two Views*, *supra* note 57, at 950-51; see also *Introduction to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, at xiii (Kimberlé Crenshaw et al. eds., 1995).

does not stand apart from questions of power and inequality or from the history that has created those inequities of power.<sup>76</sup> When parents in D.C. flee broken public schools, we do so because our relative privilege allows us to and because we want to secure that privilege for our children. What if families earning enough to pay tuition at Sidwell Friends, Georgetown Day, or St. Albans were required to send their children to public school? What if we were required to send our children to a public school where at least thirty percent of the children were eligible for free or reduced-price school lunch? Would our liberty to “direct the upbringing and education of our children” be infringed in any real sense?<sup>77</sup>

I do not suggest that there is something immoral in our desire to act always in our children’s best interests. But would we really be denied the intimacy of family or the impulse to give our children what is best were we required to throw in our lot with our less fortunate neighbors—if ensuring the best education for our children required lending our muscle to the fight for the best schools for all children?

Some will argue that I have it exactly backward. Rather than limit our freedom to choose, they say, we should extend that freedom to those who cannot afford the choice of private schools. If the public schools are failing, give poor children a voucher so that they too can choose a school that suits them. This argument purports to resolve the tension between liberty and equality by making the liberty of school choice a remedy for inequality. This solution seems attractive. It avoids having to directly confront the

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76. The Oregon legislation requiring children to attend public schools was passed in a particular historical and political context. The referendum campaign was organized and promoted primarily by the Ku Klux Klan and the Oregon Scottish Rite Masons as part of an effort to “Americanize” the schools. Anti-Catholicism was central to the proponents’ campaign. The referendum was part of a nationwide assault on pluralism that included bans on the teaching of Darwinism, foreign languages, and offensive books and the institution of required teacher loyalty oaths. For an extended discussion of the Oregon experience, see David B. Tyack, *The Perils of Pluralism: The Background of the Pierce Case*, 74 AM. HIST. REV. 74 (1968). The children attending the parochial schools the Oregon legislation sought to close were from poor immigrant families. The statute stigmatized them and excluded them from the community, albeit in the name of Americanization. One Klansman noted, “[S]omehow these mongrel hordes must be Americanized; failing that, deportation is the only remedy.” *Id.* at 79 (internal quotation marks omitted). The immigrant families in *Pierce* probably chose parochial schools for religious reasons, but the effect of the statute was to define them as outsiders and to teach their children that they were inferior. The Oregon statute’s cultural meaning conveyed much the same message as that of the segregation statute struck down in *Brown*.

77. I ask these questions for the rhetorical purpose of challenging privileged parents to reconsider their own decision to flee black urban schools as the exercise of “liberty” enunciated in *Pierce*. The answer to the ultimate question of whether *Pierce* can or ought to be read to justify the exit of wealthy children from public schools is beyond the scope of this article. For a thoughtful discussion of the constitutional and policy arguments supporting compulsory public school attendance laws that would except only the few citizens whose religious beliefs required them to exit, see James S. Liebman, *Voice, Not Choice*, 101 YALE L.J. 259 (1991) (reviewing JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA’S SCHOOLS* (1990)).

thus-far-unsolved problem of white America's resistance to racial integration and the conscious, unconscious, and structural racism of which it is a manifestation. And it is attractive too for poor black and brown families with children in failing public schools, because they understand from lived experience that no other solution will be offered.

However, the solution of expanding choice to the poor is flawed in theory and fraudulent in practice. If the injury of segregation is achieved by symbolic defamation and material/structural exclusion of African Americans from the community of fully respected citizens that creates and is created by the common school, we can only remedy that injury by reforming the common school to directly address that symbolic defamation and material/structural exclusion. Offering choice in a segregated, largely unregulated market does not do this. In practice, the schools remain segregated and unequal, although there is no longer a constitutional violation because they are no longer run by the state.

In early 2004, Congress created the first federally funded school voucher program by providing grants of up to \$7500 for at least 1600 students in Washington, D.C.<sup>78</sup> But this \$7500 voucher will not begin to pay the \$20,000-plus tuition at Sidwell Friends, Georgetown Day, or the National Cathedral School, and nothing in the legislation requires or even encourages the city's elite schools to admit significant numbers of poor black children or prevents them from expelling such children if they prove troublesome. Most of these vouchers will be spent in Catholic schools that will continue to serve only poor black and brown children. The Bush Administration is enamored of vouchers and choice precisely because they can be dressed up as solutions offered out of concern for children who are left behind without any change in our beliefs about those children or any increase in the resources we make available to them. In practice, *Pierce* is used to perpetrate a cruel hoax. It justifies the white flight that mocks the dream of integration and is then offered to fulfill the promise of equality in *Brown*.

### 1. *The State Action Doctrine as Process Defect*

Ely argues that racism undermines the democratic process by excluding blacks from participation in democracy's pluralist bazaar, where groups identify overlapping interests and enter into mutually beneficial coalitions, or by causing legislators to misapprehend the costs and benefits of legislation for the excluded group. Racism causes whites, and even some

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78. Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, div. C, tit. III, §§ 301-313, 2004 U.S.C.A.N. (118 Stat.) 3, 126-34 (DC School Choice Incentive Act of 2003).

blacks, to fear black people and shun them. Racism inhibits our ability to recognize shared interests, goals, and aspirations.<sup>79</sup> Racism cripples our capacity for empathy, for caring, for feelings of shared humanity with blacks.

The process-distorting effects of racism that Ely says exclude blacks from participation in the democratic community are the very injuries *Brown* identifies. *Brown* teaches us that, in the case of public schools, these injuries are amplified because of the central role played by the common school in creating a community and defining its boundaries. Those injuries persist when those with influence and power in that community resegregate themselves through white flight and create new communities that exclude poor black children and their families. When schools in D.C. are allowed to deteriorate because white and middle-class black parents have fled, taking the social capital of their networks and the strength of their political voices with them, the government's failure to respond to poor black children's needs is the result of a defect in democracy caused by racism. When privileged parents read about violence, low test scores, crumbling buildings, overcrowded classrooms, and unqualified teachers in their city's schools and do not see those problems as their own, when we do not bother to come to the city council hearing on the school budget, when we can hear the news of a young person murdered in a school building and not tremble with fear and grief as if this were our own child, racism and segregation have blinded us to "overlapping interests"<sup>80</sup> and caused us to misapprehend (ignore, discount, not care about) the costs to poor black children.

But this defect in democracy does not take the form of legislation or other governmental action. Although the mayor, city council, and Congress are surely influenced by the failure of people with political clout to speak on behalf of poor black children, the segregation that has excluded them from the community of care is caused by our acts as private persons. Ely's theory advocates using process injury to alert courts to constitutionally suspicious legislation and justify heightened judicial scrutiny of suspect classifications. By default he incorporates the state action doctrine: No constitutional injury occurs unless the injury is caused by a government actor.<sup>81</sup> But much of democracy's process takes place in the daily interactions among individual citizens. We engage in Madison's "political

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79. See ELY, *supra* note 20, at 153 ("Race prejudice divides groups that have much in common (blacks and poor whites) and unites groups (white[s], rich and poor) that have little else in common than their antagonism for the racial minority." (quoting Frank I. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CAL. L. REV. 275, 315 (1972))).

80. *Id.*

81. Ely discusses the state action doctrine in the context of *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Reitman v. Mulkey*, 387 U.S. 369 (1967). See JOHN HART ELY, ON CONSTITUTIONAL GROUND 275-78 (1996).

bazaar” when we talk to our neighbors over dinner and back fences, at meetings of Shepherd Park Parents with Young Children, and at the school’s open house. In this capacity as “private” citizens we discover our “overlapping interests” and our shared humanity. We come together as private persons and create community, and in so doing assume the public responsibility of mutual care and common commitment that is democracy. Or we run and hide from our poor black neighbors and say, “Those people are not us.” We create communities that exclude them, and we fail to discover what we share. Surely if Ely’s theory sees process and participation as the keys to protecting all other constitutional values, it cannot count as irrelevant or trivial the defects caused by de facto segregation and white flight.<sup>82</sup>

Moreover, an additional process defect occurs when we cease to experience white flight in racial terms, as behavior that violates the spirit and moral mandate of *Brown*, and rationalize it as the exercise of the constitutionally protected liberty of family autonomy and intimacy. As private racism is transformed into family privacy, we lose sight of the injury itself and are further blinded to our own role in its infliction or our responsibility for its redress.<sup>83</sup>

Ely accepts the limitations of the state action doctrine despite the continuing harm that privately sponsored segregation does to poor black children and to the democratic process. He does not think it his role as constitutional theorist to challenge this firmly grounded constitutional principle.<sup>84</sup> Instead, when his commitment to progressive politics makes ignoring the harm untenable, he must create an exception to<sup>85</sup> or blur the distinction between public and private.<sup>86</sup>

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82. I have made a similar observation about the state action problem in a discussion of the constitutionality of the regulation of hate speech on university campuses. See Lawrence, *Hollers*, *supra* note 57, at 445-46. I argued that the stigmatizing symbolic speech of segregation held unconstitutional in *Brown* should not be transformed into constitutionally protected speech when it moves from the mouth of government to the mouths of private persons. See *id.* at 444-49. In the context of white flight, unconstitutional stigmatization and exclusion from community are transformed into the constitutionally protected liberty of family autonomy and intimacy by the transfer of the excluding stigmatizing act of segregation from the hands of the state into the hands of private parties.

83. See *id.* at 445 (“[W]hen we decontextualize . . . this privacy value . . . , we ignore the way it operates in the real world. We do not ask ourselves, for example, . . . who has the resources to send their children to private school or move to an exclusive suburb.” (footnote omitted)).

84. West has called those theorists who believe the Constitution to be unassailable the “constitutionally faithful.” ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* 172 (1994).

85. For example, Ely turns de facto segregation into de jure segregation by ignoring the act/omission distinction. See John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1292 (1970) (“A racially motivated decision not to alter attendance zone lines should trigger a judicial demand for an explanation as readily as a racially motivated decision to redraw them, though the proof problems are likely to be more substantial.”).

86. See WEST, *supra* note 84, at 174.

## 2. *Forbidden Conversations as Process Defect*

Ely's theory assumes a free and robust exchange of ideas among democracy's participants. The First Amendment's prohibition of laws abridging freedom of speech clearly states the free speech value and does so with sufficient specificity to avoid the countermajoritarian perils of interpretivism.<sup>87</sup> Ely names speech and the right to organize politically as among the rights of political access that courts should protect<sup>88</sup> and observes that much of First Amendment jurisprudence concerns the role of political expression in the process of self-governance.<sup>89</sup>

In the preceding pages, I have described how the subjects of race and racism have become taboo in our conversations about where and how we will educate our children. Of course the prohibition is not legislated. Instead, we restrict our own speech because we cannot bear admitting our own racism. We do not want to confront the inconsistency between our ideals and our beliefs. The taboo against talk of race serves the cause of our denial. And it impedes the democratic process not just by inhibiting speech, the primary vehicle for political discourse and human connection, but by censoring our speech's content. Thus, the process defect is compounded when our commitment to the ideal of racial equality combined with our continuing fear of blackness make the subjects of race and racism taboo. The participatory process is infected further still when the taboo against talk is explained not by its real origin, our reluctance to confront the fear of blackness, but by the positive liberty of privacy. In this way we are not just forbidden to speak about race but denied an understanding of the racial origins of the taboo. How can blacks and other minorities look to the process of self-governance for protection if we cannot talk about race and racism and if none of us will admit what we are not talking about? The taboo does more than chill expression generally. It chills speech on the subject of our racism, the very subject about which we must converse if we are to resolve the "American dilemma."<sup>90</sup>

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87. ELY, *supra* note 20, at 13. For Ely, the Constitution's language falls along a broad "spectrum ranging from the relatively specific to the extremely open-textured." *Id.* Among the open-textured provisions of the Constitution are the Ninth Amendment, *id.* at 34-41, and the Fourteenth Amendment's Equal Protection, *id.* at 30-33, and Due Process Clauses, *id.* at 14-21. It is the task of Ely's work to explain how the courts should interpret such "Delphic provisions" of the Constitution. ELY, *supra* note 81, at 6. The First Amendment, by contrast, is grounded in more specificity. ELY, *supra* note 20, at 13-14.

88. See ELY, *supra* note 81, at 7. Among the primary protections afforded by the Constitution are "that the courts should protect rights of political access: the right to vote, to have one's vote counted equally, to run for office, to organize politically, to speak, and so forth." *Id.*

89. See ELY, *supra* note 20, at 112.

90. In a comprehensive and influential mid-twentieth-century study of American race relations, Swedish sociologist Gunnar Myrdal referred to the contradiction between the unifying American dream of inclusion and the reality of America's racism as the "American dilemma." See

#### IV. THE LONELINESS OF THE LOTTERY AND ALTERNATIVES THAT ENCOURAGE COLLECTIVE ACTION

I am sitting at a school board meeting. It is almost 10 p.m. We've been here since 6:30 p.m., as have many of the members of the public who have come to testify at a hearing on the administration's proposal to change the process by which parents seek to have their children assigned to a public school outside of the geographic subdistrict that has been designated as their place of residence. In D.C. this is called an out-of-boundary assignment.<sup>91</sup> Out-of-boundary assignments have long served to stem the tide of white and middle-class black flight from deteriorating public school systems. Parents who are not pleased with their child's geographically assigned school, or who feel there is a better school for their child elsewhere in the District, may apply for admission to their preferred school. In a school system where there are many failing schools and a limited number of good ones, the process is very competitive. Last year in D.C. there were 7000 applications for only 800 available out-of-boundary seats. At the James F. Oyster Bilingual School, a particularly popular elementary school, dozens of parents stood in line outside for six days, braving the January cold in down parkas and sleeping bags for a chance at one of the fifteen open slots in the school's prekindergarten class.<sup>92</sup>

Young white families in hip, up-and-coming neighborhoods in transition, where the schools have not improved as quickly as the neighborhood, are especially eager to take advantage of out-of-boundary assignments. Whether parents are simply seeking to avoid increasingly prohibitive private school tuitions or are genuinely committed to public schooling, the out-of-boundary process acts as an escape valve, allowing families who would otherwise leave the system to stay, and helps retain the tiny percentage of white students who keep the system nominally integrated.

The administration has proposed a lottery. Under the new proposal each child seeking an out-of-boundary assignment will be assigned a number, and out-of-boundary exceptions will be granted according to where the child's number is selected in the lottery.

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GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944).

91. See Justin Blum, *D.C. To Create Lottery for School Transfers*, WASH. POST, Dec. 19, 2002, at B1 (describing a school board vote to replace the first-come-first-served approach used by parents who wanted to enroll their children in schools outside their neighborhood boundaries with a lottery system).

92. See Justin Blum, *Parents Camp Out for Rare School Spots*, WASH. POST, Jan. 29, 2001, at B1.



Under the old system, parents filed a separate application for each school where they sought admission for their children. Out-of-boundary exceptions were granted by the individual principals, nominally on a first-come-first-served basis, until all vacant seats in the school were filled. In practice principals were given some discretion to deny admission if applicants had academic difficulties or discipline problems at previous schools or if, based on an interview with the student and his or her parents, they determined that the child would not fit in well at their school.

Proponents of the new lottery have argued that the old system preferred children from the most privileged families. Highly educated, middle-class parents are often the most motivated and the best informed. They learn to work the system, creating networks, gathering lists of the best programs in the best schools, learning where there are vacancies to be filled and how to use sibling preferences, claims of hardship, or special qualifications to increase their children's chances of admission. They can more easily take time off from work to stand in line, and principals, whose evaluations turn largely on the results of schoolwide performance on standardized tests, look more favorably on the applications of educated families whose children are likely to raise their school's scores.<sup>93</sup>

There are persuasive arguments for the equity of abandoning the old system. If I require proof of their descriptive accuracy, I need look no further than the roomful of parents who have come to testify at the hearing. With only a few exceptions they fit the profile of the highly educated, aggressive, middle-class parents who were favored under the old system. Most of them live in Capitol Hill, a neighborhood where the townhouses of members of Congress stand only blocks away from the projects, or in one of the exclusive white neighborhoods west of Rock Creek Park, or in Mount Pleasant or U Street, neighborhoods in transition where young white professionals are renovating lovely brownstones and brick colonials. They have come armed with multiple copies of written testimony and carefully prepared oral presentations, offering legislative and administrative history; data; analysis; proposed amendments and exceptions; and arguments for postponing, reconsidering, or doing further study of the administration's proposal. The proposals speak in neutral terms of efficiency, economy, safety, stability, settled expectations, and the best interests of children and

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93. DeNeen L. Brown, *Fight To Enter Top Schools in D.C. Knows No Bounds*, WASH. POST, Sept. 4, 1995, at B1 (describing the "desperate means" employed by some parents to try to get their children into their school of choice, including lying about where they live, begging elected officials for help, and becoming "salespeople, extolling to principals the benefits of having their high-achieving children and themselves—parents who are proving their willingness to get involved—at their schools").

the school district, but each is designed to preserve the advantages these parents gained under the old system.

My gut is growling—the excess acid in my stomach always a faithful barometer of my anger and anxiety. I resent the easy, unselfconscious air and expectation of privilege about these people, their polished presentations so different from those of the poor black and brown parents who come to tell the board of broken toilets, leaky roofs, crowded classrooms, and guns, in schools where these parents would not dare send their children.

But I feel something more complicated than resentment. I feel empathy and admiration as well. I share these people's advantages, their expectation that public servants will respond to their wishes and provide for their children's needs. I know that they represent the tiny band of privileged parents who have cast their lot with the poor and working-class children of this city. These same parents have stood with us before the city council to fight for books, safe buildings, and better teachers for all of our children, not just their own. They've mounted letter-writing and e-mail campaigns, and they have held politicians and business leaders to account. I know we need these doctors, lawyers, professors, and executives who insist on being heard and expect that their phone calls will be returned.

Already two of my African-American colleagues on the school board have voiced their impatience with the parents' proposals to revise the lottery. The whole point of the lottery, they say, is to give children from the poorest neighborhoods an equal shot at attending the best schools.

Tommy Wells, a white board member, speaks up for his constituents from Capitol Hill. Wells is arguing for an amendment to the lottery proposal that would give preference to families who live close to, but not within the boundary of, three good schools (the "Capitol Hill Cluster") in their neighborhood. William Lockridge, an African-American board member who represents Wards Seven and Eight, the city's poorest neighborhoods, is livid. He cuts Wells off, saying he is tired of rich white parents lobbying for sibling preferences, academic admission criteria, and redrawing of school assignment boundaries at the expense of the children who are most in need.

We have framed the debate as a contest between privileged white folks and poor black folks for a few seats in a handful of good schools. The lottery, it is argued, will promote the cause of equality because now each child will have the same chance as any other, regardless of the color of her skin or the wealth and education of his parents. If we all put our names into a hat (or a computer), each of us will have the same odds at getting a good education. This is the picture that formal equality paints. The promise of *Brown* becomes a chance in the lottery for a seat at a good school in a still-segregated system.

Of course, the real world of historical, structural, psychologically internalized, unredressed racism and discrimination is much more complicated. An equal chance in the lottery for the castoff remnants of a school system that those with power and influence have labeled inferior and discarded does not achieve the substantive transformation of community envisioned in *Brown*. The school district will not provide transportation for the child from the poor Southeast neighborhood who wins the lottery for a seat in the rich white Northwest neighborhood. Nor will it provide a parent to ride the public buses and subways with him for an hour each morning and afternoon, or to come to PTA meetings and parent-teacher conferences, or to see that permission slips are returned, or to be his advocate, or to say, "Don't assume this child is slow just because he's black and poor," or to cheer at a class play or basketball game, or just to be there when she needs a hug. In fact, the children who most need a good school will not even make it to the lottery because that too requires a high-functioning, motivated, informed parent.

In the meantime, those of us whose financial resources and social capital give us access to school markets beyond the lottery will simply go elsewhere when our number is not drawn.<sup>94</sup> And we will take valuable resources with us. The handful of good schools in the city have survived only because there remains a critical mass of parents who can bring these resources to them. We will lose not just those middle-class parents who are unsuccessful in the lottery. Other parents will decide that once these parents leave, their children's school will no longer be the school it once was, that they will no longer command the resources or demand the kind and quality of teaching and environment they require, or that the school will simply have become too black. This exodus of privileged parents will affect more than just the handful of schools sought after in the lottery. The entire system will lose these parents' voices, their networks, their political clout, their sense of entitlement, their claim on the public schools as their own, and their demand that those schools continue as the common school—the school that defines and is defined by the community of citizens.

Ultimately the lottery, advanced in the name of equality, will perpetuate and reinforce the inequality held unconstitutional in *Brown*. It will further

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94. See Eugene L. Meyer, *Love It or Leave It: . . . Why I Decided To Go*, WASH. POST, Apr. 21, 1996, at C1. The author describes his reluctant flight from the District and the reasons for it, including concern about schools for his two young children:

Ultimately, we were left with two in-town choices: admission into an out-of-boundary (read: west of the park) school, by ingratiating ourselves with the principal, pulling political strings or somehow faking a reason (such as, it's more convenient to our jobs). The other choice was private school, a route I'd been before with my oldest son and was prepared to take again if necessary.

But gradually, it dawned on me, there was a third choice. Move.

*Id.*

segregate our schools. But more than that, it encourages us to think of schooling as an enterprise we engage in as individuals, each gaming or paying for the best we can get for our own child. Instead, education should be a community enterprise engaged in for the good of the collective, for other people's children as well as our own.

Are there alternatives to prevalent school reform policies that would foster collective action rather than private market competition and increase the opportunities for race and class integration in urban public schools? I think there are several interrelated and rather modest suggestions that would provide attractive incentives and opportunities to parents weighing their private concerns for their children against their commitment to the public value of shared care and responsibility for all children. Why not target urban neighborhoods in transition, where temporarily integrated neighborhoods might be stabilized by attractive magnet schools and mechanisms for local control by organized groups of neighbors? Within the existing lottery system, we could create incentives for integration and collective action by giving priority or advantage, in lottery and other school assignment systems, to race- and class-integrated groups of parents. If we permitted and even encouraged parents to work together with other parents to create their own communities across race and class lines, we would significantly ameliorate the fear of loneliness in the fight against segregation and the rush to the exit that occurs when white and middle-class black families see other families fleeing. Finally, we might look for ways to encourage individuals and institutions located outside the school system to create incentives for school integration. For example, universities, as part of their affirmative action programs and in pursuit of their goal of admitting students knowledgeable about and experienced in issues of diversity, might prefer both black and white students who had attended integrated schools.<sup>95</sup> Corporate employers might create incentives for middle-class employees who send their children to race- and class-integrated schools, or they might enter into public-private partnerships with urban public schools in which they provide financial and institutional support to create magnets that would be attractive to their employees.

I return here to the theme of taboo talk and forbidden conversations. Throughout my account of the school board's consideration of the out-of-boundary policy, I spoke of the subjects of race, racism, and white flight. But in the actual school board deliberations and testimony by parents and school administrators, there was almost no direct discussion of race, white flight, tipping points, or even whether we should encourage race or class

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95. See Lawrence, *Two Views*, *supra* note 57, at 934-35, 960-61 (describing the benefits of having students from diverse backgrounds).

integration through our school assignment policy. White parents talked about their concerns for finding schools with buildings, curricula, teachers, and test scores that met their expectations for their children's education, but not about what race and class mix they could tolerate in their children's school. School board members spoke of the need to give poor black students an equal chance to attend the schools of their choice, but they did not talk about whether we ought to seek to maximize race and class integration for either its moral or its educational benefits or ask whether the lottery was the best way to maximize integration. Certainly there was no talk of the fears of blackness I mentioned earlier in this article, of whether those fears might lie at the root of white and middle-class black flight, or of whether or not our school assignment policy should take those fears into account. These are hard, scary conversations in a society that, despite its moral commitment to the ideal of equality, is still deeply divided by race and class. But they are conversations that we must have if we are to truly engage in the transformation that is the promise of *Brown*.

#### V. BEYOND A THEORY OF JUDICIAL REVIEW: WE ARE THE CONSTITUTION'S FRAMERS

Ely's subtitle for *Democracy and Distrust* is *A Theory of Judicial Review*. He places courts at the center of his case, as do most constitutional theorists. Not only does Ely make judicial legitimacy the chief subject of his thesis, his argument is directed primarily to judges and to those who make arguments before them.<sup>96</sup> Although Ely urges judicial restraint and deference to the substantive choices of the democratic process, he sees the work of constitutional interpretation as belonging ultimately to the courts. Judges must look either to the authority of constitutional structure and text or to the Framers' intent, rather than to their own values, to guide their decisions, and it is courts that must interpret the meaning of the Constitution's commands. Ely's own argument about constitutional meaning remains morally agnostic.<sup>97</sup> I think he would argue that, at least in his role as constitutional theorist, his agnosticism is consistent with his position that it is the people, not the courts, who should choose values.

In this article and elsewhere, I speak in a different voice than does John Ely. I mean not only that I choose personal narrative and argue from a

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96. I include here both lawyers who argue directly to judges and others who seek to influence judges through their scholarship.

97. For example, even on the question of the value of slavery versus nonslavery, Ely looks to the text of the document and the choices made by the Framers before and after the adoption of the Reconstruction Amendments rather than make his own case about the morality of slavery and freedom.

subjective perspective, although those choices are vital to my purpose.<sup>98</sup> My audience and my subject also differ from those selected by Ely and most traditional constitutional scholars. This article speaks directly to my neighbors, to other parents, to school board members, mayors, city council representatives, and members of Congress. I also speak to judges and lawyers and to the small circle of academic colleagues who may be my only readers. But I address those readers not as individuals with a special responsibility for constitutional interpretation but as citizens, as members of the constitutive community. And I speak to my audience about values, *our* values. My argument asks the reader who *we* are and (rather rhetorically) who we *should* be. I am not agnostic about slavery or Jim Crow or affirmative action. I speak of values as constitutional rather than personal because I am engaging in a conversation about public morality and the values we hold collectively as a community, about the way we choose to constitute ourselves as a people.

Robin West has contrasted two very different ways of engaging in constitutional conversation and constructing constitutional theory.<sup>99</sup> She names them the "authoritarian tradition" and the "normative tradition" in constitutional law. The authoritarian tradition inquires into "how we are authorized by a binding legal document—the historical Constitution—to constitute ourselves."<sup>100</sup> These are questions we ask not of ourselves but "of an authority, whether we perceive that authority to be the framers or the text."<sup>101</sup> "Here, constitutional questions are not moral questions at all. They are at best historical questions. The question is at root, What does the Constitution command?, not, How should we constitute ourselves?"<sup>102</sup> Within the normative tradition, "constitutional questions concern the manner in which we as a society choose to constitute the individual self, the community, and the government. Constitutional questions, so understood, are clearly moral questions . . . ."<sup>103</sup> West's authoritarian constitutional theorist asks, "How have we been told to behave?"; her normative constitutional theorist asks, "How should we behave?"<sup>104</sup>

Ely might well say that I have wrongly assigned his work to the authoritarian position. After all, he argues for judicial restraint in the interpretation of nonspecific provisions of the Constitution on the ground

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98. Elsewhere I have argued that a self-conscious commitment to a subjective perspective is critical to the work of scholars who toil at the margins of dominant legal discourse. See Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2251-70 (1992).

99. See WEST, *supra* note 84, at 191-98.

100. *Id.* at 193.

101. *Id.*

102. *Id.*

103. *Id.* at 192-93.

104. *Id.* at 193.

that the substantive moral values contained in the Constitution ought to be the product of the people's moral deliberation and decision.<sup>105</sup> The text of the Thirteenth and Fourteenth Amendments surely answers the Reconstruction nation's question, "How should we behave?" But here, as West points out, the contemporary interpretive task is still undertaken by reference to historical authority. It is a question about nineteenth-century morality, not our own.

I choose the normative tradition for the same reason that I walked my neighborhood in Shepherd Park seeking potential public school parents and pushed my colleagues on the school board to talk openly about white flight and the causes, real and imagined, of white and middle-class black fear. I want to talk with my neighbors about *our* values, not those of the nation's Founders or the Americans who ratified the Fourteenth Amendment. I want to ask how we should behave because I want us to take responsibility for our behavior. I do not place the legitimacy of judicial review at the center of this conversation, because to do so presumes the courts' role as primary and ultimate interpreter of constitutional meaning and places the source or authority for that meaning beyond our control. To give to courts exclusive or principal responsibility for constitutional interpretation encourages us to view the choice of values as beyond our own control.<sup>106</sup>

This article describes a world of segregated schools where the white and middle-class black families who have fled from urban schools and left poor black children behind do not see themselves as in any way responsible for the isolation, stigma, and diminished resources that mark those segregated schools and children. Having held segregated schools inherently unequal and violative of the constitutional value of nonslavery, the courts reviewed this behavior of white flight and pronounced it exempt from constitutional scrutiny.<sup>107</sup> There was no state action in these parental choices to move to all-white neighborhoods and private schools and

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105. A majority can, however, choose to bind its successors to a set of values by enshrining them in the Constitution through the amendment process. The Reconstruction Amendments were the result of such an attempt. ELY, *supra* note 20, at 33.

106. Paul Brest calls the principle of judicial exclusivity "deeply flawed." Paul Brest, *The Thirty-First Cleveland-Marshall Fund Lecture: Constitutional Citizenship*, 34 CLEV. ST. L. REV. 175, 175 (1986); see also WEST, *supra* note 84, at 190 ("The flaw is that we have delegated to the courts, rather than kept for ourselves, the moral responsibility for our decisions. By protecting, cherishing, and relying on judicial review, we have essentially alienated our moral public lives to the courts.").

107. See *Freeman v. Pitts*, 503 U.S. 467, 495 (1992) ("Where resegregation is a product not of state action but of private choices, it does not have constitutional implications."). Compare *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 17-18 (1971) (defining de facto segregation as those situations in which a "racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of state authorities"), with *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 208 (1973) (defining de jure segregation as requiring "purpose or intent to segregate").

therefore no violation of the constitutional value of equality. If the Constitution defines our public morality, and we cede to the courts its interpretation, we need not worry about examining our own values and conscience. The courts have found those who flee faultless. The authority has spoken. Moreover, the courts have given positive moral value to our choice.<sup>108</sup> Our decision to flee the soon-to-be-black public school is not immoral segregation at all, state sponsored or otherwise. It is the highly moral act of nurturing one's own child, of preserving family and protecting its autonomy from an overreaching state.

Judicial review and the authoritarian tradition help us hide from our own values, from confronting the question of what we *should* do, from coming face to face to ask questions of each other and answer them together, from bearing the responsibility for our answers. Judicial review helps us avoid the forbidden conversation. In this way judicial review itself becomes a process defect, subverting the democratic conversation about race. I choose the normative tradition to break the taboo. We must talk with one another about our public morality and the way we constitute ourselves. We must take responsibility for our behavior.

I embrace the normative constitutional conversation because it forces us to take sides. When we look to an external authority to tell us what is right and good, the moral choice is too easily portrayed as neutral or shared. A normative constitutional conversation unmasks dominant ideology and doctrine that parade in the clothing of shared values and neutral principles.<sup>109</sup> In a 1992 article on critical race scholarship, pedagogy, and politics, I urged progressive scholars of color to embrace non-neutrality.<sup>110</sup> I argued that progressive theorists, teachers, and activists must "evaluate work product (judicial opinions, legislation, organizing tactics, ideas, theory, poetry) according to the degree to which the effort serves the cause of liberation."<sup>111</sup> I said this was particularly important to the scholar engaged in constitutional discourse where "the dominant legal ideology of

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108. See *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

109. See, e.g., Alan David Freeman, *School Desegregation Law: Promise, Contradiction, Rationalization*, in *SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION* 70 (Derrick Bell ed., 1980); Lawrence, *Two Views*, *supra* note 57; Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in *THE MORAL FOUNDATIONS OF CIVIL RIGHTS* 144 (Robert K. Fullinwider & Claudia Mills eds., 1986).

110. See Lawrence, *supra* note 98, at 2259-64. In that piece, I argued,

Embracing instrumentalism, like owning one's perspective, serves a dual liberatory purpose. By keeping our politics at the forefront and measuring our work and that of others by the bottom line of results, we can be certain that theory is disciplined by purpose and guided by the needs and resulting insight of those for whom change is most urgent.

*Id.* at 2259-60.

111. *Id.* at 2259.



equal opportunity employs the rhetoric of antidiscrimination and equal treatment to disguise the clash in values between those who are burdened by . . . discriminatory conditions and those who are responsible for and benefit from those conditions.”<sup>112</sup> When I talk with fellow citizens about our values (mine and theirs) and I am unambiguous about where I stand, those clashes become apparent. More important for the project of integration and progressive antiracist politics, we will also know, or discover in the course of candid conversation, when our values are truly shared.

When we make constitutional arguments only to courts or to those who belong to the elite debating society that is trained in the language and ritual of the law, we engage in a conversation among those who are politically dominant while excluding the ideas and voices of subordinated peoples. Mari Matsuda has urged a jurisprudential inquiry and method that deliberately chooses to see the world from the standpoint of the oppressed.<sup>113</sup> Engaging laypersons from the communities where we live and work in constitutional conversation makes more room for voices from the bottom, whose experience in urban segregated schools challenges the “neutral principles” embodied in the state action doctrine and in *Pierce*’s right to a private segregated education for children from privileged families. As a progressive black scholar who writes from the margins of legal discourse, I cannot be content to accept that marginal location. It will not do for me to gain a more central place in that discourse by sacrificing the liberating content of my message, framing my argument to fit the borders of conventional form, or addressing my case only to those to whom we have given authority. I move the constitutional conversation beyond judicial review because I believe it my primary task and obligation to open constitutional discourse and make it more inclusive.

### CONCLUSION

This article has employed the lens of my own personal experience as a neighbor, parent, school board member, citizen, and constitutional scholar to consider how the flight of white and middle-class black parents from urban public schools—and the fears that motivate that flight—subvert the principle of equal citizenship enunciated in *Brown v. Board of Education*

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112. *Id.* at 2260.

113. See MARI J. MATSUDA, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, in *WHERE IS YOUR BODY?: AND OTHER ESSAYS ON RACE, GENDER, AND THE LAW* 3 (1996) (directing lawyers to see the world from the standpoint of the oppressed and to maintain multiple consciousness as a way of transferring the details of their own special knowledge to the standard jurisprudential discourse).

and undermine the democratic process by inhibiting honest conversation about race and racism. I have argued that *Brown* identifies the American public school as a critical site for understanding and shaping the meaning of equality. *Brown* assigns the public school this central place not only because it was public schools that inflicted on black children the psychic injury of a "feeling of inferiority,"<sup>114</sup> or because schools were the "principal instrument in awakening the child to cultural values[ and] preparing him for later professional training,"<sup>115</sup> but also because the public school was a chief instrument for the creation and definition of the community of fully valued citizens. I have argued here that when white and middle-class black parents flee predominantly black urban public schools, they recreate the constitutional injury of exclusion from community and empathetic regard identified in *Brown*.

I have observed that the racial fear that motivates white and middle-class black flight, and our reluctance to acknowledge that fear, causes us to avoid the conversations that might cast light on the prejudicial origins of our decisions to abandon black urban schools. This taboo against candid conversation about the causes of white flight is reinforced by the intense intimacy and privacy that parents experience in relation to their children. When parents rationalize and explain the taboo against talk about race and racism in the race-neutral language of familial intimacy and privacy, we avoid asking ourselves the hard question of whether racism has influenced white flight. When fear of confronting our racism causes less speech, the constitutional values of both equality and free speech are implicated.

These two values reside at the center of John Ely's theory of representation reinforcement and of *Democracy and Distrust*, a book grounded in democratic political theory. Judicial review functions to enhance democracy by responding to malfunctions in the representative system that "chok[e] off the channels of political change."<sup>116</sup> These channels carry the commerce of speech, empathy, the recognition of commonalities of interest, and shared humanity. There is also a related, but distinct, theory of prejudice at the heart of Ely's book. The channels that carry speech, empathy, and recognition of common interest are choked off most often by fear and loathing of those who are viewed in some fundamental way as "other." When we forbid or avoid conversations about race and racism, Ely's insights about democracy and prejudice are powerfully implicated. I have endeavored in this article to explore some of those implications.

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114. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

115. *Id.* at 493.

116. ELY, *supra* note 20, at 103.

John Ely was a shy man. When we were both on the faculty of Stanford Law School, he never wandered aimlessly into my office to chat. But when I went to his office, bringing a hard conversation with me, he was not afraid of me or of the difficult subject of our shared racism. He was rare in this regard, and I respected him as much for this fearlessness as for his great intellect. John Ely was dean of the law school when I came to Stanford, and I know that he was influential in the law school's decision to hire me. I believe that John hired me because he knew that I would insist that my students and my colleagues engage in forbidden conversations and break the taboos that choke off the channels of liberation and change. I think he would be pleased that I have used this Symposium to continue the job he handed me.